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James Stokes Lectureship on Politics
New York University

SOVEREIGN STATES AND SUITS

"*Those who hold the destinies of nations in their hands, whether rulers or legislators, should submit to every sacrifice, . . . before authorizing an appeal to arms. The extreme solicitude to avoid these calamities, by the aid of peaceful congresses and impartial mediation, is, on the whole, the strongest evidence, stronger than that afforded by the progress of science and art, of our boasted advance in civilization.*"

—*Prescott's* Conquest of Mexico,
Vol. II, Bk. III, Ch. VII, p. 35 (*1843*).

SOVEREIGN STATES AND SUITS

BEFORE ARBITRAL TRIBUNALS AND COURTS OF JUSTICE

By

JAMES BROWN SCOTT

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THIS LITTLE VOLUME OF LECTURES IS
GRATEFULLY INSCRIBED TO THE CHANCELLOR,
THE MEMBERS OF THE FACULTY, AND THE STUDENTS
OF NEW YORK UNIVERSITY WHO HONORED
ME WITH THEIR PRESENCE

PREFATORY NOTE

In Prescott's *Conquest of Mexico*, published some eighty years ago, that careful and thoughtful writer, comparing the massacre of Cholula with those of the Peninsula War—Badajos and Taragona—indulges in the following reflections:

> The consideration of these events, which, from their familiarity, make little impression on our senses, should render us more lenient in our judgments of the past, showing, as they do, that man in a state of excitement, savage or civilized, is much the same in every age. It may teach us—it is one of the best lessons of history—that, since such are the *inevitable* evils of war, even among the most polished people, those who hold the destinies of nations in their hands, whether rulers or legislators, should submit to every sacrifice, save that of honor, before authorizing an appeal to arms. The extreme solicitude to avoid these calamities, by the aid of peaceful congresses and impartial mediation, is, on the whole, the strongest evidence, stronger than that afforded by the progress of science and art, of our boasted advance in civilization.[1]

The trouble with the passage—indeed, the fly in the ointment, if one may use such a common expression for such elevated reflections—is with the word "honor"; and the trouble with honor is its difficulty of definition. Shakespeare tried his hand at it from the very practical and human standpoint of Falstaff, whose great original had met Jeanne d'Arc on the field of honor and had run from both:

> Honour pricks me on. Yea, but how if honour prick me off when I come on? how then? Can honour set to a leg? no: or an arm? no: or take away the grief of a wound? No. Honour hath no skill in surgery, then? no. What is honour? a word. What is that word, honour? air. A trim reckoning!—Who hath it? he that died o' Wednesday. Doth he feel it? no. Doth he hear it? no. Is it insensible, then? yea, to the dead. But will it not live with the living? no. Why? detraction will not suffer it:—therefore, I'll none of it: honour is a mere scutcheon:—and so ends my catechism.

[1] William H. Prescott, *History of the Conquest of Mexico, with a preliminary view of the Ancient Mexican Civilization, and the Life of the Conqueror, Hernando Cortes*. 3 volumes. Vol. II, Bk. III, Ch. VII, p. 35 (1843).

If, however, the little phrase "save that of honor" be omitted—as it must, if it be understood in the sense of Gallatin that "the true honor and dignity of the nation are inseparable from justice"—then it may be said that the present course of lectures delivered in New York University in the Spring of 1924 are as a gloss upon this little-quoted passage from Prescott's much-read book. They endeavor to show the conception of the modern State as the agent of the people composing it, and the steps by which the modern States renouncing the settlement of disputes between them have, through agencies of their own creation, brought about their impartial decision or, as Prescott would say, mediation—"the strongest evidence . . . of our boasted advance in civilization."

The repeated absences of the lecturer from this country, together with his desire for the careful revision of the lectures, have prevented their earlier publication. For assistance in this revision as well as for critical oversight of the production of the book, the lecturer is happy to confess his indebtedness to the Director of the New York University Press, Professor Arthur H. Nason, and to Miss Hannah E. Steen, Secretary to the Director.

James Brown Scott.

New York City,
May 27, 1925.

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SOVEREIGN STATES AND SUITS BEFORE ARBITRAL TRIBUNALS AND COURTS OF JUSTICE

INTRODUCTION

On the eve of the Franco-Prussian War, one Charles Baudelaire, a French poet and prose writer of distinction, and a pessimist in both characters, described the state of mind not only of his own, but also of many a generation, from which we of to-day are, I veritably believe, consciously if slowly emerging:

Beneath a dull expanse of gray sky, in a vast and pathless plain of sands, without a blade of green, or thorn, or thistle, I met some men, burden-bowed, toiling wearily on.

Each back bore a huge Chimera, heavier than sack of grain or coals, or trappings of Roman legionary. Nor was the monster an inert mass; nay, its powerful elastic muscles were girded and tightened around its man; two immense talons pierced his breast; its grotesque head reared above his brow like one of those horrible helmets with which warriors of old would terrify the enemy.

I questioned one of these men and asked him whither they were going, thus burdened. He answered that he did not know nor did the others; but that evidently they must be destined somewhere since they were urged forth by an invincible need of journeying.

Strangely, none of these travelers seemed to be annoyed by the ferocious beast planted upon his neck and back; one would have said that he regarded it as a part of himself. None of these weary and serious faces testified despair; under the dome of the sombre sky, their feet sinking into the dust of a soil as lifeless as the sky, they were trudging ahead with the resigned expression of men condemned to hope on forever.

And the line passed along from beside me and vanished in the haze of the horizon where earth's rounded surface withdraws from the curious eye of man.

For some moments I pondered this mystery; but soon irresistible Indifference fastened upon me and I was more heavily weighed down than were they of the burdensome Chimeras.[1]

[1] *Œuvres Complètes de Charles Baudelaire,* Edition Critique par F. F. Gautier (Paris, 1921), pp. 20–21.

I have quoted these few lines as a general introduction, in order that those who encourage me by their presence may mark the distance between undue despondency and legitimate hope, and measure the progress which day by day tends to confirm to the outer eye the faith which is in us, instead of condemning us, in Baudelaire's language, to an eternal and an empty hope.

I

THE SOVEREIGN STATE OF TO-DAY

The course of lectures which I have the honor to deliver before the University deals with sovereign States, tribunals of arbitration, and courts of justice. It does not deal with these topics in their larger aspects, but in certain limited relations, which, therefore, need to be defined in order that they may be understood. And the best way to make assurance doubly sure before forcing the door of the arbitral tribunal or entering the temple of justice, is to ascertain at the outset, while the foot is still upon the threshold, what manner of person is the State, that it should approach the tribunal with reluctance, that it should apparently prefer to view the court from a distance and stand aside or, indeed, make way for others to pass. If self-preservation is the first law of nature and of nations, the sovereign State of to-day may well fear the consequences of the morrow if it thoughtlessly allows itself to be dragged up the steps of tribunal or of court, and finds itself, at the end of its journey, before the very throne of law; for, like Magna Carta, law, to use the quaint but pithy phrase of Sir Edward Coke, "is such a fellow that he will have no sovereign."

If, then, law is the ultimate sovereign, and the State claims to be sovereign, we are involved in a conflict of sovereigns, and the triumph of one may seem to involve the defeat of the other. Yet both are necessary in their proper places; and, instead of discord, there is harmony if we but understand the facts of international life and square our definitions to the facts, instead of adjusting facts to preconceived theory. We are to such an extent the slaves of

words that we are often carried away to our destruction by a happy phrase, and that, however our eyes are fixed upon the future, our conception of things lags behind, and is, indeed, frequently but the expression of a state of things that has ceased to exist.

The reason for some of the confusion in the "status" of States (if that phrase be permissible) is that State and estate were in fact, and not long ago, convertible terms, both forming the domain of the king, princeling, or potentate who governed or misgoverned one or the other, according to the bent of his mind or the extent of his ability or incapacity. Too often he ruined his State as he squandered his estate, and thought less of the former than he did of the latter. The additions to the original domain were hid from sight by the royal authority, just as the divisions of an orange, bound together and covered by the rind, are invisible to the naked eye when held firmly in hand. Or, if this illustration be unworthy of so great an example, all power was concentrated and centralized in the hand of the sovereign, to be exercised through agents of his own choice, responsible to him, unmindful of the tenant whose interests they might not subserve. It was no metaphor when Louis XIV identified himself with the State, for the State was his; he was in fact its sovereign, and his will was undoubted law.[1] Under such circumstances, there could be

[1] Two characteristic statements of the old point of view overthrown by the Americans of the Revolution may be quoted.

In his *Mémoires*, Louis XIV commiserates the King of England, who is obliged to listen to his Parliament:

"It is certain that this subjection which places the sovereign under the necessity of taking the law from his people, is the last calamity which can befall a man of our rank. . . .

"It belongs exclusively to the head to deliberate and to decide, and all the functions of the other members only consist in the execution of the commands which have been given to them. . . .

"Instead of one king whom the people should obey, they have at one and the same time a thousand tyrants, with this difference, however, that the orders of the legitimate prince are never other than mild and moderate, because they are founded upon reason, whereas those of these false sovereigns, being inspired only by their unregu-

no conflict between the two. In our own day, the late Emperor of Germany, visiting Munich, wrote in a guest book in that artistic and pleasure-loving city, the motto of princes taken from the imperial law of Rome, that the will of the prince makes law. This was to a large extent a mediæval conception, and it was, until recently, the conception of mediævally-minded men. It prevailed in theory long after it ceased to exist in fact, just as the expiring rays of the sun are visible after it has sunk below the horizon.

If the point of approach, however, be not from above, as in the case of the domain, but from below, as in the case of a community or commonwealth of our day, we are confronted with a different condition of things. We find people living together upon portions of the earth's surface, a fact which is still a prerequisite to the conception of the State in constitutional or international law, although we control the ocean and are mastering the air. Within the limits of a definite community, whether it be large or small, we are dealing with people; and, in any form of organization which they may choose to adopt, persons in authority, however high-placed, are but their agents; and they are continued or displaced, according to the pleasure of the community or of the commonwealth. The will of the people, not that of the prince, makes law. The people are

lated passions, are always unjust and violent." Charles Dreyss, *Mémoires de Louis XIV, pour l'instruction du dauphin*, t. II (1860), p. 6, 405.

"Don't forget that Faure [President of France]—not his personal fault—sits on the throne of the King and Queen of France 'by the Grace of God' whose heads Frenchmen Republicans cut off! The Blood of their Majesties is still on that country! Look at it, has it since then ever been happy or quiet again? . . . Nicky, take my word on it, the curse of God has stricken that People for ever! We Christian Kings and Emperors have one holy duty imposed on us by Heaven, that is to uphold the Principle 'von Gottes Gnaden [by the Grace of God]'; we can have good relations with the R.F. but never be *intime* with her! I always fear that, in frequent and long visits in France, people without feeling it imbibe Republican ideas." *Letter of William II, German Emperor, to Nicholas II, Czar of All the Russias*, dated Potsdam, October 25, 1895. Isaac Don Levine, *Letters from the Kaiser to the Czar, Copied from Government Archives in Petrograd unpublished before 1920*, (New York, 1920), pp. 21, 23.

in this conception the direct instead of the ultimate source of authority; collectively they are sovereign, and under these circumstances law does not mean restriction upon sovereignty, but restriction upon the agents of sovereignty.

We have shifted the source of authority even when we have kept the form. The hereditary monarch — to disregard the term "sovereign," inappropriate in name as antiquated in fact — is the servant of the community or commonwealth. He is no longer its master; he may be its representative from the outward point of view, but in reality he has descended from the throne and is a fellow-citizen among his countrymen. We are therefore dealing with a new conception, which is similar in substance, if not in form, throughout the community of Nations. The State is no longer the patrimony of any one man, sovereign, monarch, or president. The State has become a general term for a people grouped within certain lines and organized for a political purpose; it is governed by agents chosen directly or indirectly, for a term of years, who are subject to reëlection if they have done well, and subject to dismissal if they have failed in their duty. At all events and in all cases, they are subject to the law which has created their office; for no office under such a system exists without a law creating it or regulating its exercise. These agents, however exalted or lowly they may be, are punishable for a violation of law, whether by impeachment or by process of courts of justice; for, in our day, even the monarch is subject to removal. When, therefore, we speak of a sovereign, we do not have in mind the personal sovereign; and when we speak of a sovereign State, we do not mean that the State is sovereign: we mean rather that the people within given territorial limits have the right to establish the form of government which satisfies their needs or desires, and to change the form of government when it has outlived the purpose for which it was created.

The people are like a household and may change their servants as becomes the head of the house.

It is difficult to tell the exact time when a new conception comes into being. It is ordinarily a gradual process, although it may seem sudden to those whose eyes are blinded. But to chosen spirits, standing on the hilltop above the plane of humanity, the first rays of the sun destined to warm and to illumine the world are visible long before they gladden the eyes of those in the valley or even on the plain. Speaking as an American to an American audience, I may say that, so far as we are concerned, the new day dawned in this western world on or about the 4th of July, 1776. Others, in earlier ages, had seen the light, and had paid only too often the penalty of their vision on the scaffold or in prison; but in this country of ours, without traditions except such as we chose to maintain, or better still, to make, the old order of things gave place to a broader, if not wholly new conception.

The men and women who had landed in Virginia introduced representative government into America; the men and women who had landed on Plymouth Rock, and later in Boston, likewise introduced representative government. But while they remained upon or near the seaboard, their offspring pressed westward, founding in their way towns and villages which have grown into cities, each governing itself and forming part of the commonwealth. When the authority of the Crown of Great Britain was repudiated, the sovereign powers which the wearer of the crown had exercised passed to the States, and in the American conception, to the people of the States. The new order had come into being, and the source of authority was in each State the people; and the government of the State, its agent. Unwilling to allow the arbitrary exercise of power by the Crown, they were unwilling to permit the arbitrary exercise of power by an agent of their own choice. The

government of law had superseded the government of man.

As an authority for these observations, and for the conception of the American State, we generally appeal to the Declaration of Independence of these United States. But it is perhaps better for our purpose to appeal to the fundamental law of one of the States which had separated from Great Britain before the general separation of the States by the Declaration of Independence—a State which considered itself free, sovereign, and independent from the time of its declaration, and asserted its independence during the Revolution to such an extent as to ratify the Treaty of Amity and Commerce and the Treaty of Alliance with France, in 1778, to exchange ratifications thereof, and in the person of its Governor to transmit the ratifications of these treaties to M. Gérard, then the Minister of France to the United States.[2] I refer to the Commonwealth of Virginia, and to the statement of the fundamental rights upon which Virginia claimed to base and actually did found its government.

The Convention of that State met at Williamsburg, then its capital, on the 6th day of May, and adjourned on July 5, 1776. On the 12th day of June, it adopted a Bill of Rights, framed almost wholly by George Mason.[3] It is perhaps not irrelevant to mention that the delegate to the Continental Congress who proposed the independence of the colonies was Richard Henry Lee, a statesman of Virginia; that the pen which drafted the Declaration of

[2] Henri Doniol, *Histoire de la Participation de la France à l'Etablissement des Etats-Unis d'Amérique*, t. iv (1890), p. 155.

[3] "An American bill of rights is a declaration of private rights reserved in a grant of public powers—a reservation of a limited individual sovereignty, annexed to and made a part of a limited form of government established by the independent, individual action of the voting class of the people. The general purpose of such a bill of rights is, to declare those fundamental principles of the common law, generally called the principles of English constitutional liberty, which the American people always claimed as their English inheritance, and the defence of which was their justification of the war of 1776." Justice, later Chief Justice, Doe, in the case of *Orr* v. *Quimby*, 54 New Hampshire, 590, 613 (1874).

Independence of the Continental Congress was held in the firm and courteous hand of Thomas Jefferson, a statesman of Virginia; and that the doctrines of the Declaration of Independence, not the patrimony of any one man or of any one section, were already stated in their entirety by George Mason, a statesman of Virginia, before receiving at the hands of his younger compatriot their more polished and literary form in the most famous of American public documents.

I ask your attention to the Virginian or Mason's Bill of Rights,[4] as it is indifferently called, which appears to be the first clear exposition of the principles upon which the modern State was founded, and which seems to have been not merely followed by the various States of the Revolution, but to have been, together with Declarations of the other American States, the source of the French manifesto of August 26, 1789,[5] known as the *Déclaration des droits de l'homme et du citoyen*, without which the history of modern Europe can neither be adequately written nor properly understood.[6]

[4] For the text of this document, see Appendix I, No. 1, pp. 253–256.

[5] "*The first state to set forth a declaration of rights properly so called was Virginia.* . . . The French Declaration of Rights is for the most part copied from the American declarations or 'bills of rights.' . . .

"This declaration of Virginia's served as a pattern for all the others, even for that of the Congress of the United States, which was issued three weeks later. . . . The French have not only adopted the American ideas, but even the form they received on the other side of the ocean." Georg Jellinek, *The Declaration of the Rights of Man and of Citizens* (1895), English translation by Max Farrand (1901), pp. 18, 20, 23, 43.

In the French translation (1902), p. vii, of Professor Jellinek's little masterpiece, M. Larnaude, then Professor and later Dean of the Law School of the University of Paris, confirms the American origin of the French document:

"It was in the United States that we found the Declaration of Rights. The comparison, article by article, of the French Declaration with several declarations of the American States, notably that of Virginia, establishes this beyond a doubt. Herein is the law of imitation again demonstrated and actually proven."

[6] "And it may be said that if the French Revolution had not made the Declaration of Rights its very own, it would never have had the resounding acclaim which caused it to be incorporated in most of the constitutions of the civilized world. Those peoples who made for themselves a declaration of law more or less similar to ours, thought neither of Virginia nor Massachusetts. But they were touched by the breath of our great Revolution, and they borrowed from it that new law of the Twelve

Mason's Bill of Rights is a very short document. I hold a copy of it in my hand upon a single sheet of foolscap, and, short as it is, the theory of the State which it propounds is even shorter. It is but a few paragraphs. It has a preamble so short that it takes less time to quote it than to describe it: "A Declaration of Rights made by the representatives of the good people of Virginia, assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government." There is no attempt, it will be observed, on the part of the present declaration to bind the future, but to endow it with the rights which those who proclaimed them professed for themselves. The first section is but a single sentence setting forth:

> *THAT* all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Evidently the good people of Virginia felt that upon separation from Great Britain the bonds which held them together were severed. They thereupon entered, of their own free will, into a state of society, defining the equality of the people composing it, and enumerating the rights which they intended to enjoy—rights which were to be possessed by the descendants of those who entered into the state of society. It is perhaps not pedantic to observe that "state" is here used as synonymous with "status."

The second section is but a single sentence, and shorter than its predecessor, providing that, "all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times

Tables, that new *Credo*, that political gospel of modern times whose prodigious results can never be fully estimated. For its consequence was the complete transformation of the public law of Europe." M. Larnaude, *ibid.*, in preface to French translation (1902), pp. viii–ix.

amenable to them." The Crown is no longer the source of authority; it is derived from the people who are entering into a state of society.[7] All persons in authority are but trustees and servants of the people forming the society, *and at all times amenable to them.* This is the conception of democracy, although, as we shall see, it is democracy at the source, culminating in representative government.

This phase of the question forms the subject-matter of the third section, likewise a single sentence, but longer than either of the two of which it is but a continuation. It states roundly that "government is, or ought to be, instituted for the common benefit, protection, and security, of the people, nation, or community." There is no misunderstanding Mason's meaning, and he chose his words with infinite care and dexterous precision. Practical man as he was, he saw that government was not framed everywhere in accordance with his principles; but, feeling that it ought to be, he said so bluntly and without circumlocution. Government is for all, and it is to be exercised for the benefit of all, not for a part of the people or for the benefit of a class of the community. And the principle that he lays down is to apply to the people as individuals, and to a nation as the sum total, or to the lesser fraction which he calls a community. He recognized that there might be many forms of government; he was interested, however, in the *best* form, and, utilitarian before Bentham, he adopted as the test the greatest good of the greatest number. "Of all the various modes and forms of government," he said, "that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladmin-

[7] "Every state constitution is a compact made by and between the citizens of a state, to govern themselves in a certain manner; and the constitution of the United States is likewise a compact made by the people of the United States, to govern themselves, as to general objects, in a certain manner." Chief Justice Jay in *Chisholm* v. *Georgia,* 2 Dallas, 419, 471 (1793).

istration." His principle is flexible; he recognized that a government might serve this purpose at one time, and yet fail at another. Therefore, he added "whenever any government shall be found inadequate or contrary to these purposes, a majority of the community"—he does not say here, "the people," because as a practical man he knew that any political action is the resultant of forces, as in the physical world—"hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal." He is dealing with men, not with chattels which can be passed from hand to hand or sold under the hammer. And in this conception, no man could by contract, and no people, nation, or community could by treaty, bind himself or itself into slavery.

Without further comment let me run through some other provisions of a general nature, to be found in this bill which passes current on this continent and is accepted at its face value in other parts of the world. Sections 4, 5, 6, 14, 15, and 16 — the last and in some respects the greatest; it is certainly the most prophetic — provide within the compass of a paragraph—for no section of the instrument is more than a paragraph:

4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge, to be hereditary.

5. That the legislative and executive powers of the state should be separate and distinct from the judicative; and that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

6. That elections of members to serve as representatives of the people,

in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for publick uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the publick good. . . .

14. That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of *Virginia*, ought to be erected or established within the limits thereof.

15. That no free government, or the blessing of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

16. That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.

Sometime ago, I had the pleasure of discussing the theory of the State with a very learned foreigner, who had at his finger-tips the theories of State propounded in Germany and elsewhere. He said he found most conceptions unsatisfactory. I ventured to hand him George Mason's Declaration of Rights. It was new to him, and he read it with interest. I asked him if it met with his approval. He replied that it did. I further asked him if it overlooked anything essential. He said that it did not. Emboldened by his reply, I asked him if he could suggest additions. He could not. To my further inquiry, if it met the conditions of our day, he said it did—and of all future time!

Of a modest country, it does not become me to indulge in further eulogy or to embark upon the troubled seas of political prophecy. I merely content myself with saying that this, Ladies and Gentlemen, is the conception of the

State in which the word is to be used in these lectures. It is an old conception, yet ever new, whose day is not yet run, and whose fruits have not been fully gathered.

The people, therefore, are the source of power; and, entering into the state of society, or organizing themselves for a political purpose, to express it in the language of to-day, they form a status or State. We must be careful, however, not to be deceived by appearances; the State is not merely the sum total of the men, women, and children living within determined limits—it is that and something more; and this something more makes the difference between a mass of individuals and a new unit which we may call a State in terms of constitutional law, and in terms of international law, a nation. It is true that these terms are used interchangeably, but it is better to distinguish between them; for, although we may speak of the State of the American Union, or the State of France, we do not speak of the law of States, as we do of the law of nations—or indifferently, since the days of Bentham, international law, the law between nations, not the law between States.

The State has a twofold aspect, as it is looked at from within, or without. Within, the relations of the individuals are regulated by what is ordinarily called constitutional law; without, the State is a unit formed by the people composing it, but losing their individuality and merged into a new unit. It is the "nation" of international law; and the relations of each such unit, or nation, with the others require a law of nations. Just as the States of North America form the United States of America, so the nations of the world form the family, community, or Society of Nations.

Simple illustrations often make clear the most difficult of conceptions, and they are the best. In the case before us, they suffice. Most people belong to a society of one

kind or another. They know that they compose the society, and that it is something different from and outside of themselves. The laws of the land governing them do not suffice for the infinitesimal society which they have formed. They draft rules or by-laws after much deliberation, and often much heat, and thus frame a law for their society, thereby evidencing, although they do not trouble themselves much about it, the society as a body distinct from its component parts, with a will collective instead of individual, with by-laws and some kind of governing board. The new body is, however, subject to their control, exercised in accordance with the rules which they have adopted. The power that makes may unmake; but, until the members exercise their power, they sustain a twofold relationship: that of individuals towards one another; that of members towards the society. They have created a new status: the status of a society, when they have organized, we shall say, for a non-political purpose; the status which we call a State, when they have organized for a political end. Viewed from within, we see the new body in its material or natural aspect. Viewed from without, the relationship is immaterial or artificial. The individual can act in his individual capacity; the organization is an artificial body, which can not act of itself, but only through agents.

The State—for I shall henceforth speak of the political status—is an artificial person, representing and controlled by its members, but not synonymous or identical with them. Created for a political purpose, it is a body politic. It is a distinct body, an artificial person; it has a will distinct from its members, although its exercise is controlled by them; it has rights and duties distinct from its members, but subject to being changed by them; it may hold property distinct from its members, but in trust for them; it may act separately and distinctly from them

and bind them by its acts, but only in so far as it is authorized by the law of its creation, and subject to being changed by the source of power.

If we look upon the State as made up of individuals, it follows that, although it is an artificial creature, it is not a soulless body. And the soul will be that of its members, collective rather than individual, but none the less real. The States of the American Union are made up of men, women, and children, drawn together from the four quarters of the earth; but, notwithstanding differences of race, inherited traditions, diversity of language, and the vast number of persons foreign to one another, there is a soul in America which, in every great crisis, finds itself and becomes articulate. Nobody has, I believe, expressed this better than the late Robert Bacon, from whom I beg to quote a few phrases. Speaking in the dark days of 1916, he asked,

> Has the influence of large numbers among us who have not been assimilated into the national life, grown so great that we no longer have an *American* spirit?

And he answered his own question:

> I, for one, believe in the National Soul; I believe that there *is* an American spirit, that there will be an American opinion, which will manifest itself in no weak, inactive, negative, neutral way, when once the public consciousness is aroused.

Mr. Bacon was right. There was in America a national spirit; and there always is a national spirit in every State although it is latent, often sluggish, and finds expression only on great occasions.[8] With Mr. Bacon, the question was not academic, as it may seem to us to-day. He knew

[8] "There is something new astir throughout the nation. It is the awakening of the public consciousness. . . .

"The nation is responding. Public opinion, for which we have waited so long, is beginning to express itself in no uncertain terms. There is an awakening throughout the land. The call for Americans to save America is sounding from house to house

that only from the national consciousness could spring a national opinion, which, in international relations, is as essential as the nation in international law.

"But this country will never assume its rightful place in the society of nations," he said on the same occasion, "until the *national* consciousness has been aroused. In order to be a leader in international opinion, it is necessary that we have a truly *national* opinion, which shall realize and respect the honourable obligations of international conduct. Such an opinion," he continued—and I desire to emphasize his words, for international life is worth having only on his conditions—"can spring only from a national soul freed from the domination of selfish, material interests."

A body of men and women organized for a political purpose, with a law for its organization, form the State of constitutional law; the State thus composed, these men and women viewed as a whole, form the nation of international law; and the nations of the world form a community or Society of Nations, whose actions are controlled by the law of nations, made by the nations, creating for them rights and duties, and accepted as binding the conduct of the nations in their mutual and varied intercourse.

I have dwelt perhaps too long upon general and somewhat obvious aspects of the subject, in a desire to make it clear that although we are dealing with people, we are dealing with them in international law only as merged in the States or nations whereof the Community or Society of Nations is formed. In this Society, each nation is the unit, with a national soul, a national consciousness, a national opinion; and, in consequence, there is a Society of Nations with its law—for society is unthinkable with-

and from city to city like that call which 'on the 18th of April in '75' spread 'through every Middlesex village and farm,' . . ."

The quotations in the text are from Mr. Bacon's address of March 4, 1916, before the convention of the National Security League at St. Louis. J. B. Scott, *Robert Bacon—Life and Letters* (1923), pp. 246–247.

out law—and with a national opinion without which the nation is inarticulate and lifeless in the midst of international activity, too often synonymous with anarchy.

As we are dealing with an international opinion, which forces compliance with the law of nations and its duties, in proportion to its conscious existence and its general expression, I shall leave the field of the abstract, and speak in more concrete terms on each of these phases of the question before us, in order that, with preliminary conceptions out of the way, we may come to grips, as it were, with the subject-matter of this course of lectures.

There are many definitions of State and Nation, and there are many treatises on the rights and duties of nations. There is in very truth an abundance of material, and the few illustrations to which I must confine myself can be enlarged almost at pleasure.

I shall ask attention to a famous decision of the Supreme Court of the United States involving the question whether Texas, after its ordinance of secession of 1861, was to be considered a State of the Federal Union in the sense of the Constitution and, as such, qualified to invoke the original jurisdiction of the Supreme Court—that is to say, to begin its suit in the Supreme Court instead of beginning in a lower court and only reaching that august tribunal in last instance, by way of appeal.[9]

In deciding this question in the affirmative, Chief Justice Chase was obliged to consider the various senses in which the word State is used—and his opinion gives not only a clear and accurate definition of the elements which inhere in the idea of State, but analyzes the conception of a State independent of and as a part of the Union. There is perhaps no better treatment of the subject to be found in the books.

But before taking up the Texas case, I should like to lay

[9] *Texas* v. *White*, 7 Wallace, 700 (1868).

before you certain passages from the opinion of Mr. Justice Iredell in the case of *Penhallow et al.* v. *Doane's Administrators*[10] decided as early as 1795, but a few years after the creation of the Supreme Court, and when all of its members had lived through the Revolution and had taken part in those stirring events. Mr. Justice Iredell's opinion deals with the question of the State and the people forming it. Contemporary exposition is said to be the best; and his views are the views of a contemporary, and of an ardent supporter of the Constitution of these United States. I quote him in this place for the further reason that his views are not only very material to the present question, but because they were quoted with approval and relied upon by Chief Justice Chase in the Texas case to which I shall shortly invite your attention.[10A]

"A distinction was taken at the bar," Mr. Justice Iredell said, "between a state, and the people of a state. It is a distinction I am not capable of comprehending. By a state forming a republic (speaking of it as a moral person), I do not mean the legislature of the state, the executive of the state, or the judiciary, but all the citizens which compose that state, and are, if I may so express myself, integral parts of it; all together forming a body politic."[11]

The learned Justice then drew a distinction between monarchies and republics, saying that "in the former, the monarch is considered as the sovereign, and each individual of his nation as subject to him," but, on the other hand, "in a republic, all the citizens as such are equal, and

[10] 3 Dallas, 54.

[10A] By a typographical error in the official report of *Texas* v. *White*, 7 Wallace, 700, 720 (1868), the name of Mr. Justice Patterson is given inadvertently for that of his much greater colleague, Mr. Justice Iredell.

[11] "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty." Chief Justice Taney in *Dred Scott* v. *Sanford*, 19 Howard, 393, 404 (1856).

no citizen can rightfully exercise any authority over another, but in virtue of a power constitutionally given by the whole community and such authority, when exercised, is, in effect, an act of the whole community, which forms such body politic. In such governments, therefore, the sovereignty resides in the great body of the people, but it resides in them, not as so many distinct individuals, but in their politic capacity only."[12] It is to be observed that Mr. Justice Iredell here draws the distinction between the people as individuals and the people as a whole, in what may be called their united capacity. This is the view which I have the honor to lay before you. And he proceeds to illustrate it by a familiar illustration which in itself must have carried conviction to his contemporaries, as it certainly does to us of to-day. The Supreme Court then held its sessions in Philadelphia, and it was natural that he should address himself to the people of the State of Pennsylvania. "Thus," he said, "A., B., C., and D., citizens of Pennsylvania, and as such, together with all the citizens of Pennsylvania, share in the sovereignty of the state. Suppose a state to consist exactly of the number of 100,000 citizens, and it were practicable for all of them to assemble at one time and in one place, and that 99,999 did actually assemble: the state would not be, in fact, assembled. Why? Because the state, in fact, is composed of all the citizens, not of a part only, however large that part may be, and one is wanting; in the same manner as 99£ is not a hundred, because one pound is wanting to complete the full sum."[13] After observing that such exactness could not be had in human affairs; that the business of the day could not wait until all of the members of the body politic could be got together; and that, if they were, it would be difficult to debate and to reach a deliberate

[12] 3 Dallas, 93.
[13] *Ibid.*

opinion, he said, "mankind have long practised . . . upon the principle, that the majority shall bind the whole," and that "when they do so, they decide for the whole, and not for themselves only." He proceeds to enforce these principles, which can not be gainsaid, by a series of familiar illustrations:

> Thus, when the legislature of any state passes a bill, by a majority, competent to bind the whole, it is an act of the whole assembly, not of the majority merely. So, when this court gives a judgment by the opinion of a majority, it is the judgment, in a legal sense, of the whole court.[14]

There is no doubt that in his opinion the State was an abstract conception—the outer covering—the shell, as it were, of which the people were the kernel.

To take up now the Texas case. Chief Justice Chase, who spoke not only for himself, but for the majority of the Court, addressed himself to "the correct idea of a State, apart from any union or confederation with other States."[15] He was aware, of course, that the word "State" was used "in quite different significations"; indeed, he went so far as to say that hardly any word had been used in more different significations than this very word "State," which confronted him. I would ask you now to listen to his exact language:

> It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.

But there was a root to the many branches. "It is not difficult to see," he continued, "that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily

[14] *Ibid.*, 94.
[15] 7 Wallace, 720.

or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state."[16] This is, of course, a restatement of the views of Mr. Justice Iredell. The Chief Justice said so expressly, and added, "we are not aware of anything, in any subsequent decision, of a different tenor."

If we discard the question of a written Constitution, although there are few States or nations at the present time without one, it is believed that the State of the American Constitution is, in effect, the State of to-day, viewed from within, and that from without, it is the nation of the Society of Nations. The definition of the Chief Justice, which is, without a modification of any kind, that of this course of lectures, is "the combined idea . . . of people, territory, and government."[17] Again to quote the Chief Justice:

> A state in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.[18]

Let us now see the sense in which the term "nation" is used in international law. We know that, from within, it is our friend the State, and that international law takes up the State of constitutional law, treating it as a unit in a still larger organization.

Let us begin, as in the case of the State, with a judicial definition of the Supreme Court of the United States. In the leading case of *Cherokee Nation* v. *State of Georgia*,[19] it was contended that the Cherokee nation was a foreign State; and, in delivering the opinion of the Court, Chief Justice Marshall laid down what seemed to him to be the essential elements of such a State: "a distinct political

[16] 7 Wallace, 720.
[17] *Ibid.*, 721.
[18] *Ibid.*
[19] 5 Peters, 1 (1831).

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society, separated from others, capable of managing its own affairs and governing itself."

In a much later case, *Montoya* v. *United States*,[20] the Supreme Court had occasion to consider the sense in which the term "nation" is used, as the question of damages for depredations committed by certain Indians depended upon their forming or not forming a nation. "The word 'nation,' as ordinarily used," Mr. Justice Brown said, in delivering the unanimous opinion of the Court, "presupposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries, and the power to enter into negotiations with other nations."[21] It is to be observed that, in essence, this is the State of constitutional law, and that the only element of the nation which the State may not possess is found in the last of Mr. Justice Brown's essentials—"the power to enter into negotiations with other nations."

Speaking in New York, one may do well to take a definition or two from a New York court of justice. And of the many, the time at our disposal will permit but two. The first is from the *Republic of Honduras* v. *Soto*.[22] The case is of interest, inasmuch as, under the Code of Civil Procedure of the State of New York, a defendant might require security for costs upon suit brought by "a person residing without the state," or "a foreign corporation."

The Republic of Honduras claimed, and rightly, to be a foreign, independent State. It was not so anxious, however—as is often the case—to comply with its duties, as to exact its rights. The plaintiff claimed that, as a foreign, independent State, it was neither a person nor a foreign corporation within the meaning of the Code. Upon this state of affairs, Ruger, Chief Judge of the Court of

[20] 180 United States, 261 (1901).
[21] *Ibid.*, 265.
[22] 112 New York, 310 (1889).

Appeals, made some observations that go to the heart of things, and that are very pertinent to a course of lectures dealing with sovereign States and courts of justice. It was admitted that Honduras was an independent government, and that it had been recognized as such by the United States. It was, to quote the language of the learned judge, "capable of entering into contracts and acquiring property, as well as competent, through the rule of comity, of bringing and maintaining actions in the courts of this country." It was claimed, however—and it is because of this contention that the case has an importance for us—that it did not come "within the description of legal entities authorized to require security for costs." The question therefore resolved itself into one of fact, whether the Republic of Honduras was, in law and in fact, a person beyond the State of New York or a foreign corporation. On this, the Chief Judge said:

> Vattel defines "nations or states to be bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint effort of their combined strength. Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person, who possesses an understanding and a will peculiar to himself, and is susceptible of obligations and rights." [23]

The learned Judge was not content to rely upon the statement of writers of authority. He invoked the practice of nations:

> That such a being constitutes a legal entity, capable of acquiring and enjoying property and protecting itself from injuries thereto in the courts of foreign countries, has long been recognized and established in the tribunals of civilized nations.[24]

The Chief Judge was of the opinion that the word "person" was used "in its enlarged sense," and in that sense

[23] Law of Nations, 1; Wheaton's *International Law*, c. 2, ss. 1, 2; Bouvier's *Institutes*, title "Nation."

[24] *Republic of Mexico* v. *De Arangoiz*, 12 N. Y. Super. Ct. 636 (1856); *Hullet* v. *King of Spain*, 1 Dow. & C. 169; *Cherokee Nation* v. *Georgia*, 5 Pet. 52, 8 L. Ed. 25.

"embraces moral persons having legal rights, capable of entering into contracts and incurring obligations, as well as natural persons." A State, therefore, is a person separate and distinct from the men and women forming it. It is an international unit, capable of entering into relations with other international units. The people of the State have been merged into the nation; and nation confronts nation as a person with all the rights and duties which artificial persons can have.

In reaching the conclusion of the Court, Chief Judge Ruger cited among his authorities that of the *Republic of Mexico* v. *De Arangoiz*.[25] The judgment of the Court of the State, to which he referred, was indeed in point; and the opinion of Judge Duer who rendered the judgment still deserves consideration; for the views which he expressed are alike necessary to the conception of the nation and the law of nations. But he should speak for himself:

> A republic, acknowledged as such by our own government, is an independent sovereign power; in other words, a state, just as certainly, and in the same sense, as a monarchy, limited or absolute; and every state is a person, an artificial person, in a more extensive and far higher sense than an ordinary corporation. A state, whatever may be the form of its internal government, and by whatever appellation it may be known, is, in the language of Vattel, "a moral person, having an understanding and a will, capable of possessing and acquiring rights, and of contracting and fulfilling obligations."[26]

This is sound doctrine, and as familiar as it is sound, and in strict accordance with the views then and now prevailing. It was the opinion of Judge Duer himself, who said:

> The definition given by other writers on the law of nations is substantially the same, and, indeed, it is upon the truth of this definition that the whole science of international law is founded—since it is evident, that it is only upon persons, having an understanding and a

[25] 5 Duer, 634, 636, 637 (1856).

[26] Vattel, *Droit des Gens*, liv. I, c. I, s. 4. *Vide*, also, Wheaton's *Elements of International Law*, vol. I, c. 2. ss. I and 2.

will, that law can operate. Every valid law implies the duty of obedience, and it is only by persons that obedience can be rendered.

If the world were made up of one nation, it would be the State of constitutional law. The moment a second nation came into being, there would be a possibility of international law. But that possibility would become a reality only when the two States, whether neighbors or not, came into contact. Until Commodore Perry, acting in behalf of the United States, introduced Japan to the outer world, it was a State of constitutional law; it was not a member of the Society of Nations. It lived in isolation, surrounded by the seas, and shut off from the world at large. In 1853 it was in the world, but hardly of it. Rapidly other nations came into contact with it, and to-day, it is a member in good and full standing of the Society of Nations.

There may be an international law if there be only two States; but these States must be independent of each other in the sense that each controls its affairs from within, and is not under the domination of the other—otherwise, we have in form two States, but in fact, one. The State of constitutional law may be completely organized internally, without being a nation of international law. This distinction can be well illustrated by the States of the American Union, whose relation to one another and to the Union which they made, has been stated in masterly fashion by Chief Justice Chase in the case of *Lane County* v. *Oregon*,[27] and quoted with approval by the learned Chief Justice in the Texas case, with which we are already familiar. He said:

> The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The states disunited might continue to exist. Without the States in union there could be no such political body as the United States.[28]

[27] 7 Wallace, 71, 76 (1868).

[28] In 1911, Mr. Justice Lurton quoted with approval the above language of Chief

The reason for that is, that the States existed before the Constitution; that, for reasons which then seemed good and sufficient to them, and even better to us after a century and a half of experience, they divested themselves of their international status and formed themselves into a Federal Union under the name and title of The United States of America. An essence of the nation, therefore, is that it can enter into relations with other nations. The eyes of the State are turned inward—those of the nation look beyond the horizon, however large, of the State of constitutional law.

Let us revert for a moment to conditions in which a State admittedly existed, but in which another State claimed superiority—in the illustration which I am about to make each State claimed supremacy. The success of either would have been fatal to the State of international law, indeed, to international law itself. During the Middle Ages two powers were in mortal combat—the Papacy, claiming, because of its spiritual origin, supremacy over the so-called Holy Roman Empire. Now the will of one prevailed, now the will of the other. In the end, the contention of each was rejected; and the States of Europe emerged equal in law, although unequal in fact. And, from the meeting of that great conference of States which we call the Congress of Westphalia, at the end of the Thirty Years War—the Protestants at Osnabrück, and the Roman Catholics at Münster—the nations of modern Europe emerged, and a Society of Nations came consciously into being.

Since the adjournment of this Congress in 1648, many

Justice Chase, in delivering the opinion of the Supreme Court in *Coyle* v. *Oklahoma*, 221 United States, 559, 580, and followed it, on behalf of the Court, with the very important statement that:

"To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."

nations, like stars, have risen and fallen below the horizon; and the old system of the Old World has ceased to exist. But the State or nation, old or new—whether it be an empire, of which the British Empire and Japan are to-day the only examples; or a kingdom, of which there are fewer to-day than a few years ago; or a republic, of which the examples are many—the State or nation exists; and, in their entirety, they make up the nations forming to-day that international community called indifferently the family, the community, or the Society of Nations. "Society," however, bids fair to displace "Family," and rightly so; for at the family board there is a head, while there is none in the Society of Nations. In the family, there may be a will which is not that of the majority of its members, whereas in the Society of Nations, there can be only a legal will in accordance with the law of the Society which has either been devised by its members or to which they have freely consented.

The law of the Society is not a thing of our day. It grew up by usage and custom. It was in being when the rebellious thirteen Colonies of North America knocked at the door and asked admittance; and they agreed tacitly to the system of law governing the Society, as does every new State on being admitted to the Society. Nobody has, I believe, better stated this simple yet fundamental truth than Daniel Webster, one of our great Secretaries of State, when he said, in the '40's, in an instruction to our Minister to Mexico:

> Every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war.[29]

[29] Daniel Webster to Mr. Thompson, April 15, 1842. *The Works of Daniel Webster*, vol. VI (1851), pp. 427, 437.

I shall not dwell further upon the Society of Nations, to which high-minded souls and persons with vision seek to give conscious and definite form and shape at the end of great wars, which for victor and victim are alike catastrophies. I shall take it for granted that, for the past three centuries, there has been a Society of Nations conscious of its rights, less conscious of its duties, giving at least lip-service to a law called the law of nations, based upon the usages and customs of nations, of which the evidence is the writings of learned persons who have dealt with this branch of jurisprudence.

What is, or should be, the content of these usages and customs? Many and various are the attempts to enumerate them. Recently a Secretary of State of the United States —a most distinguished citizen of the State of New York —has given his approval to a statement of them based upon the principle of equality. In an address on the centenary of the Monroe Doctrine, delivered in Philadelphia in the fall of 1923, Secretary Hughes—for it is of him that I would speak—sought to define the attitude of the United States toward the Republics of Latin America. And with a quotation from this address and a word of comment, I bring to a close the preliminary observations to which the first lecture of the course is devoted.

"We recognize," he remarked, "the equality of the American Republics, their equal rights under the law of nations. Said Chief Justice Marshall: 'No principle of general law is more universally acknowledged than the perfect equality of nations. . . . It results from this equality that no one can rightfully impose a rule upon another.' At the first session of the American Institute of International Law, held in Washington in the early part of 1916, the jurists representing the American Republics adopted a declaration of the rights and duties of nations. This declaration stated these rights and duties 'not in terms of

philosophy or of ethics but in terms of law,' supported by decisions of the Supreme Court of the United States. This declaration set forth the following principles:

I. Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the State to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending States.

II. Every nation has the right to independence in the sense that it has a right to the pursuit of happiness and is free to develop itself without interference or control from other States, provided that in so doing it does not interfere with or violate the rights of other States.

III. Every nation is in law and before law the equal of every other nation belonging to the society of nations, and all nations have the right to claim and, according to the Declaration of Independence of the United States "to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them."

IV. Every nation has the right to territory within defined boundaries and to exercise exclusive jurisdiction over its territory, and all persons whether native or foreign found therein.

V. Every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative, and the right of one is the duty of all to observe."

Of these five articles, the Secretary of State said:

It can not be doubted that this declaration embodies the fundamental principles of the policy of the United States in relation to the Republics of Latin America. When we recognized these Republics as members of the family of nations, we recognized their rights and obligations as repeatedly defined by our statesmen and jurists and by our highest court. We have not sought by opposing the intervention of non-American powers to establish a protectorate or overlordship of our own with respect to these Republics. Such a pretension not only is not found in the Monroe Doctrine but would be in opposition to our fundamental affirmative policy.

I do not intend to comment upon this Declaration other than to say that Secretary Hughes' approval of it and his application of its principles to the relations of the American Republics go far to make the Declaration law for the

Americas if it is not to be taken as law for the world at large.

There is a sixth article to the Declaration which Secretary Hughes did not quote, as it was not material to his purpose. It is, however, material to ours, as international law is not only law between nations, but is also law within the nation, and indeed in every State of constitutional law. If that were not so, foreigners would often be forced to seek their rights through diplomatic channels—an interesting but expensive and often dilatory process—instead of resorting directly to the courts of a nation for redress under a rule of international law. The sixth article was designed to express and safeguard this double remedy by providing that:

VI. International law is at one and the same time both national and international: national in the sense that it is the law of the land and applicable as such to the decision of all questions involving its principles; international in the sense that it is the law of the society of nations and applicable as such to all questions between and among the members of the society of nations involving its principles.

But this is not enough; there must be something more to render the other branch of the twofold remedy effective. This phase of the subject, the "Suggestions for a Governed World," adopted by the American Peace Society in 1921, some three years ago, attempt to cover by an agreement of the nations

To furnish their citizens or subjects adequate instruction in their international obligations and duties, as well as in their rights and prerogatives;

To take all necessary steps to render such instruction effective; and thus

To create that "international mind" and enlightened public opinion which shall persuade in the future, where force has failed to compel in the past, the observance of those standards of honor, morality, and justice, which obtain between and among individuals, bringing in their train law and order, through which, and through which alone, peace between nations may become practicable, attainable, and desirable.

II

THE STATES OF THE AMERICAN UNION AND THE UNITED STATES

On the 2nd of July, 1776, the representatives of the thirteen English-speaking colonies of North America severed their connections with the Mother Country by the adoption of a resolution of independence. Two days later, on the 4th of July, the Congress proclaimed this independence in a solemn declaration, setting forth the motives by which they were actuated and a statement of the grievances which, in their opinion, justified the declaration, which, if general opinion is to be trusted, is one of the great state papers of America and of the world.[1]

Before the adoption of the resolution of July 2nd, there were thirteen colonies in revolt and, by their respective delegates, meeting in a revolutionary congress. At the adoption of that resolution, there were thirteen colonies united in fact, though not in law, to bring about their severance from the Mother Country. After the adoption, the colonies had made themselves free and independent States, in so far as this could be done by the adoption of a resolution. A committee, of which Thomas Jefferson, of Virginia, was chairman, had been appointed to draft a declaration. The final draft of this document was adopted and proclaimed on the 4th of July, authenticated by the President and the Secretary of Congress, and signed later by the members of the Congress in behalf of their respective States.

As I am desirous of pointing out that the thirteen

[1] See Appendix I, No. 2, pp. 257–258.

States calling themselves the United States demonstrated the feasibility of judicial settlement by means of a court of their own creation in which State could sue State, and in so doing furnished a model to the other free and independent States of the world to create a court in which they could sue and be sued, I deem it necessary to show that the American States became, when they dissolved their connection with Great Britain, free and independent States in the sense of international law. They thought they became so. They stated it in the Declaration of Independence, and they reiterated it in the Articles of Confederation. It was the contemporary understanding of the legal effect of separation, an understanding confirmed by the very court itself which they created in the Federal Convention of 1787, and embodied in their Constitution of a more perfect Union of free, independent, and sovereign States than that of the Articles, and, in the opinion of many, still the most perfect Union of States which, without the union, would be free, independent, and sovereign in the sense of international law.

Let us examine the important steps toward independence and the justification of the *fait accompli* in the Declaration of July 4, 1776. On June 7, 1776, in the Continental Congress then meeting in the City of Philadelphia, Richard Henry Lee of Virginia moved the following resolution, which was seconded by John Adams of Massachusetts:

> *Resolved*, That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.[2]

The consideration of the resolution was postponed in order to give the delegates from colonies which had not adopted

[2] Worthington Ford, *Journals of the Continental Congress*, vol. V, 1776 (1906), p. 425.

the measure an opportunity to consult their constituents. In the meantime, a committee was appointed to draft a declaration. On the 2nd day of July the resolution was adopted, exactly as it was proposed, except for a slight change in punctuation and the addition here and there of a capital which had been lacking in the original, and which evidently had assumed some importance in the opinion of Congress. In the original, the words "free and independent" were in small letters; in the resolution they appeared in capitals. In the original, the State of Great Britain was in capitals; in the resolution, as adopted, the State of Great Britain was reduced to small letters. These matters have no importance: they are merely mentioned in passing.

It is important, however, that the United Colonies were to be free and independent States, not a single united State. The Mother Country is referred to as the State of Great Britain in both texts of the same resolution, so that it would appear that when the delegates in Congress spoke of one State they used the singular, and as men of education, they used the plural when they spoke of more than one State.

It would also seem to be clear that, in the opinion of the Congress, as evidenced by the resolution, these United Colonies became, by its adoption, free and independent States, and, as such, nations of international law. The declaration very properly rejects United Colonies for United States, inasmuch as, by the resolution of July 2nd, they ceased to be colonies in becoming States. It is true that, in the final paragraph of the declaration, the word "Colonies" and the expression "United Colonies" appear; but that is due to the fact that the declaration incorporates the text of the resolution of July 2nd, with the authority to make the declaration not from the United Colonies, but from the people of these colonies. The para-

graph is familiar, but assuredly I do not need to apologize for quoting it:

> *We, therefore,* the Representatives of the *united States of America,* in General Congress assembled, appealing to the Supreme Judge of the World for the rectitude of our intentions, DO, in the Name, and by the Authority of the good People of these Colonies, solemnly PUBLISH and DECLARE, That these United Colonies are, and of Right, ought to be *Free and Independent States;* that they are Absolved from all Allegiance to the British Crown, and that all political connexion between them and the State of Great Britain, is and ought to be totally dissolved; and that, as FREE and INDEPENDENT STATES, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which INDEPENDENT STATES may of right do.[3]

It will be observed that the only change in the declaration is to rehabilitate the State of Great Britain by investing it with a capital which it had possessed in the original resolution of June 7th, but which it had lost in the resolution as drafted and adopted on July 2nd.

It will be observed further that dissolution of allegiance from Great Britain is followed by the consequences which, in the opinion of the framers of the draft, followed from the dissolution: that the erstwhile colonies, in becoming free and independent, have all the rights of nations, with "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which INDEPENDENT STATES may of right do." These qualities inhere only in the States of international law.

The first treaties which they made were with France, on the 6th of February, 1778: a treaty of amity and commerce, which only independent States could contract; and a treaty of alliance which enabled them to obtain their independence. In the preambles to these treaties, we meet

[3] Worthington Ford, *Journals of the Continental Congress,* vol. V, 1776 (1906), p. 514.

with a formal interpretation of what both of the contracting parties believed to be their international status. The contracting parties are stated in the very first lines of the preambles to be, "The Most Christian King, and the thirteen United States of North America, to wit, New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia."[4]

On September 3, 1783, a treaty was concluded with Great Britain, by which that country recognized the independence of its rebellious colonies. This is done in the first article, the language of which is important to our present purpose, inasmuch as it mentions and defines what Great Britain recognized and the capacity in which the States wished to be, and, therefore, were recognized, as the result of the long war:

> His Britannic Majesty acknowledges the said United States, viz. New Hampshire, Massachusetts Bay, Rhode Island, and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign and independent States; that he treats with them as such.[5]

It will be observed that the Declaration speaks of "free and independent States," but that, in the treaty with Great Britain, the word "sovereign" makes its appearance. This is due to the fact that, in the interval since the Declaration of Independence, and indeed after the subsequent treaty with France, the free and independent States had defined their status towards one another and the world, formed a confederation under the style of "The United States of America," and had entered into Articles of Confederation, adopted by the last of the States on March 1, 1781, from which time the Articles were effective.

[4] Malloy, *Treaties and Conventions*, 1776–1909, vol. I, p. 468.
[5] *Ibid.*, vol. I, p. 587.

The first of the articles declares "the stile of this confederacy shall be 'The United States of America.'" The second article characterizes in unmistakable terms the nature of the confederacy and the quality of its component parts: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

It is thus apparent that, in the opinion of the framers of the Declaration, the States were free and independent; that, in the Articles of Confederation forming their first legal union, the States were considered by themselves as sovereign, free, and independent; and that, in the treaty with Great Britain, they were recognized expressly "to be free, sovereign and independent States."

If, as it is frequently asserted, contemporaneous interpretation is the best, it would seem that we are dealing with States, not with provinces; and if our purpose were academic, merely to establish a truth irrespective of its application, the instances which I have cited would suffice. But our purpose is practical as well: to show that these States were nations of international law before they formed themselves into a Union of States, renouncing the attributes of the State under international law, and assuming, on a footing of equality, the status of States under constitutional law—the law of the Union of States. If this be a correct analysis of conditions, it then follows that the nations of the world may unite themselves into some form of federation, however loose, and create a court of justice in which they may sue and be sued as such, as the States of the American Union have done. If they should be inclined to do this, it would be because of the American experiment and its success. And, without forcing terms, it is exactly what they have done unconsciously in the formation of every international union, composed of nations

acting upon a footing of equality, such as the Postal Union, the Telegraph Union, and many other unions.

The establishment of the Permanent Court of International Arbitration at The Hague was a union of States forming it, for the restricted purpose of arbitration. The constitution of a Permanent Court of International Justice at The Hague is a union of the States agreeing to its creation for the limited purpose of the administration of international justice—that is to say, for the settlement of the disputes arising between and among them by what we are accustomed to call judicial process, to be resorted to only after diplomacy and, it may be, the various means of diplomacy have failed, without an appeal to force. Therefore, I would seek to make assurance doubly sure by invoking the authority of the Supreme Court of the United States in support of these views.

Mr. Justice Iredell was a very distinguished lawyer in the early days of the Republic. He was an Englishman by birth and therefore without colonial prejudices; he was from North Carolina, and appointed by President Washington to the Supreme Court when his State had ratified the Constitution. For North Carolina, for reasons which we may not discuss here, refused to ratify that instrument until after it had gone into effect and after President Washington had taken the oath of office; indeed, it was not until several months after that happy event. Justice Iredell was an ardent federalist—that is to say, strongly in favor of the federal form of government created by the Constitution; and he had advocated powerfully but unavailingly the ratification of the Constitution in the convention of his State, called in 1788 to consider that momentous question. Had he not been in favor of the Constitution, a sound lawyer, and a representative and upright man, he would not have been appointed by President Washington to the Supreme Bench; for the Father of

our Country rightly looked upon appointments to that Court as the most important of any which he had to make. The Supreme Court was then established in Philadelphia prior to the creation of the noble City of Washington, to perpetuate in a visible and ever-growing form the name of the founder of our independence.

While I may not go into the causes of the American Revolution, as this is foreign to our purpose, we are especially interested in its consequences; and, in the leading case of *Penhallow* v. *Doane*, cited on a previous occasion, Mr. Justice Iredell, speaking as a man who had lived through and taken a part in the events which he narrated, considered with judicial calm and poise both aspects of the problem when he said:

> Under the British government, and before the opposition to the measures of the parliament of Great Britain became necessary, each province in America composed (as I conceive) a body politic, and the several provinces were no otherwise connected with each other, than as being subject to the same common sovereign. Each province had a distinct legislature, a distinct executive (subordinate to the king), a distinct judiciary; and in particular, the claim as to taxation, which began the contest, extended to a separate claim of each province to raise taxes within itself; no power then existed, or was claimed, for any joint authority on behalf of all the provinces to tax the whole. There were some disputes as to boundaries, whether certain lands were within the bounds of one province or another, but nobody denied that where the boundaries of any one province could be ascertained, all the permanent inhabitants within those boundaries were members of the body politic, and subject to all the laws of it.[6]

While this passage does not need comment, it may be permissible to say, in order to reinforce it and to show its fundamental importance, that the provinces were never united, that they were thirteen separate and distinct bodies politic, owing an allegiance to a common superior but having no legal relation one with another. They were

[6] 3 Dallas, 1795, 54.

separate; they were distinct; and they were not over-friendly.

To continue the statement of Mr. Justice Iredell:

When acts were passed by the parliament of Great Britain, which were thought unconstitutional and unjust, and when every hope of redress by separate applications appeared desperate, then was conceived the noble idea, which laid the foundation of the present independence and happiness of this country (though independence was not then in contemplation), of forming a common council to consult for the common welfare of the whole, so far as an opposition to the measures of Great Britain was concerned.[7]

Important as are Mr. Justice Iredell's observations hitherto, I beg to call your especial attention to the language of his opinion which immediately follows the views which he has just expressed, because it makes of itself this double assurance—that of theory and of fact—to which I have referred:

In order to compose this common council, each province chose for itself, in its own way, and by its own authority, without any previous concerted plan of the whole, deputies to attend at a general meeting to be held in this city.[7A]

And to continue further the quotation from Mr. Justice Iredell:

Some appointed by their assemblies; others, by conventions; some, perhaps, in other modes; but, in whatever way the appointment was made, it was notoriously done with the hearty consent and approbation of the great body of the people in each province, and therefore, the appointment was unexceptionable to all those who thought the opposition just, and a union of the whole in the measures of opposition necessary. Each province even appointed as many or as few deputies as it pleased, at its own discretion, which was not objected to, because the members of congress did not vote individually, but the votes given in congress were by provinces, as they afterwards were (subsequent to the declaration of independence, and until the present constitution of the United States was formed), by states.[8]

[7] *Ibid.*, 90.
[7A] *Ibid.*
[8] *Ibid.*, 90–91.

While the language of Mr. Justice Iredell is clear and the order of his ideas in strict conformity with the march of events, I would venture to call your attention again to his statement as a contemporary witness, that never until the government of the Constitution did the delegates from provinces or States vote as individuals, but that the province and State voted as province and State.

I invoke another passage, in order to have the process toward union stated with the balance of a contemporary possessing the inestimable blessing of a judicial mind. Iredell's mind was judicial to such an extent that in the early days of the Supreme Court his dissenting opinion from the judgment of his brethren, permitting an individual to sue a State of the Union, was confirmed by the first amendment to the Constitution after the adoption of the first ten, which are in the nature of a Bill of Rights, and, indeed, were the conditions for the adoption of the Constitution itself by the States.[9]

The result of the deliberations of the common council, culminating in the Declaration of July 4, 1776, is thus stated by Mr. Justice Iredell in a model of sentences:

When the obnoxious acts of parliament passed, if the people in each province had chosen to resist separately, they undoubtedly had equal

[9] "When the Constitution was adopted by the Convention of 1787 and placed before the people for their acceptance or rejection, many wise statesmen whose patriotism no one then questioned or now questions earnestly objected to its acceptance upon the ground that it did not contain a Bill of Rights guarding the fundamental guarantees of life, liberty and property against the unwarranted exercise of power by the National Government. But the friends of the Constitution, believing that the failure to accept it would destroy all hope for permanent union among the people of the original States, and following the advice of Washington who was the leader of the constitutional forces, met this objection by showing that when the Constitution had been accepted by the requisite number of States and thereby become the supreme law of the land, such amendments could be adopted as would relieve the apprehensions of those who deemed it necessary, by express provisions, to guard against the infringement by the agencies of the General Government of any of the essential rights of American freemen. This view prevailed, and the implied pledge thus given was carried out by the first Congress, which promptly adopted and submitted to the people of the several States the first ten amendments. These amendments have ever since been regarded as the National Bill of Rights." Mr. Justice Harlan in the case of *Maxwell* v. *Dow*, 176 United States, 581, 606–607 (1900).

right to do so, as to join in general measures of resistance with the people of the other provinces, however unwise and destructive such a policy might, and undoubtedly would have been. If they had pursued this separate system, and afterwards, the people of each province had resolved that such province should be a free and independent State, the state, from that moment, would have become possessed of all the powers of sovereignty, internal and external (viz., the exclusive right of providing for their own government, and regulating their intercourse with foreign nations), as completely as any one of the ancient kingdoms or republics of the world, which never yet had formed, or thought of forming, any sort of federal union whatever.[10]

The learned Justice is here clear, that the provinces were separate bodies politic. He is equally clear that they remained separate until they decided to form a Union, which they did under the Articles of Confederation, stating themselves at the time to be free, sovereign, and independent, and until they formed the more perfect Union of the Constitution, creating a government of the Union and delegating to it certain powers of sovereignty, reserving to themselves the other powers of sovereignty which they did not grant to the Union.

Let me quote a further passage from Justice Iredell, a passage from his dissenting opinion in the case of *Chisholm* v. *Georgia*, decided two years previous to the *Penhallow* case, which I have already laid under heavy contribution. It is a quotation from that dissenting opinion, confirmed by the people of the States in the final court or tribunal of appeal in this country of ours which alone has power to amend the Constitution, and in this special instance ratified by the States within five years after the decision in this case without an adverse vote of any of them. In the passage to be quoted, it is to be borne in mind that Justice Iredell is speaking not of the province before the declaration, not of the State after the declaration, but of the State in this Union of States which we call the United

[10] 3 Dallas, 92–93.

States. "Every State in the *Union*," he says, "in every instance where its sovereignty has not been delegated to the *United States*, I consider to be as completely sovereign, as the *United States* are in respect to the powers surrendered. The *United States* are sovereign as to all the powers of Government actually surrendered: Each State in the *Union* is sovereign as to all the powers reserved. It must necessarily be so, because the *United States* have no claim to any authority but *such as the States have surrendered to them:* Of course the part not surrendered must remain as it did before."[11]

Without wishing to weary you with authority for views which to the framers of the Constitution seemed as self-evident as the truths of the Declaration of Independence, I should like to call your attention to a passage from the very leading case of *Ware* v. *Hylton*, decided three years later than the *Chisholm* and one year later than the *Penhallow* case. It is from a Justice of the Supreme Court who had himself been a signer of the Declaration of Independence, and presumably knew what he was doing. The example he cites is that of Virginia. He was himself of Maryland. This is what Mr. Justice Chase said in the course of his opinion, which has been constantly referred to by the Supreme Court as authoritative upon the great question decided in the case:

In *June*, 1776, the Convention of *Virginia formally* declared, that *Virginia* was a free, sovereign, and independent state; and on the 4th of *July*, 1776, following, the *United States*, in Congress assembled, declared the *Thirteen United Colonies* free and independent states; and that as *such*, they had full power to levy war, conclude peace, &c. I

[11] *Chisholm* v. *Georgia*, 2 Dallas, 419, 435 (1793).

"The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States." Chief Justice Waite in *United States* v. *Cruikshank et al.*, 92 United States, 542, 551 (1875).

consider this as a declaration, not that the United Colonies *jointly*, in a *collective* capacity, were independent states, &c. but that *each* of them was a sovereign and independent state, that is, that *each* of them had a right to govern itself by its own authority, and its own laws, without any controul from any other power upon earth.[12]

I ask you to listen further to three short paragraphs of his opinion, because I am unwilling to dismember it, and by quotation of a part lay myself open to the charge of injecting into it views which the learned Justice did not express:

Before these solemn acts of separation from the Crown of *Great Britain*, the war between Great Britain and the United Colonies, *jointly*, and *separately*, was *a civil* war; but *instantly*, on that great and ever memorable event, the war changed its *nature*, and became a PUBLIC war between *independent governments;* and immediately thereupon ALL the *rights* of *public* war (and all the other rights of an independent nation) attached to the government of *Virginia;* and all the *former political* connexion between *Great Britain* and *Virginia*, and also between their respective subjects, were totally dissolved; and not only the *two nations*, but all the subjects of each, were in a state of war; precisely as in the present war between Great Britain and France.

From the 4th of *July*, 1776, the *American* States were *de facto* as well as *de jure*, in the possession and actual exercise of *all* the *rights* of independent governments. . . . I have ever considered it as the established doctrine of the *United States*, that their independence originated from, and commenced with, the declaration of Congress, on the 4th of *July*, 1776; and that *no other period* can be fixed on for its commencement; and that all laws made by the legislatures of the several states, *after* the declaration of independence, were the laws of sovereign and independent governments.[13]

At this very time, the first President of the United States was making the first of those tours which, in our days, we are accustomed to speak of disrespectfully as "swinging round the circle." Dinners were given in his honor. They must have been serious affairs, for the toasts,

[12] *Ware, Administrator of Jones, Plaintiff in Error,* v. *Hylton, et al.,* 3 Dallas, 199, 224 (1796).
[13] *Ibid.,* pp. 224–225.

we are informed, were regularly sixteen in number, the last being for the President of the United States, who graciously retired at this moment, so that he might not be present when his health was drunk. The toasts expressed the thoughts uppermost in the minds of Washington and his contemporaries. Otherwise, they would not have been given, and, if given, President Washington would not have remained. Among the toasts were "The People of the United States of America"; "the King of the French"; "the National Assembly of France"; "the Sieur la Fayette and generous Friends to America in the Day of her Distress"; "the Memory of all those who have fallen in the cause of America"; "the Powers of Europe friendly to America"; and the final one, "The perpetual Union of distinct Sovereign States under an efficient Federal Head."[14]

I should like to invoke the testimony of another contemporary and witness of the events whose consequences he draws, "conspicuous" as Washington and Lincoln "for patient considerateness to all sides," and possessing "a mind . . . sound in its ultimate judgments, and firm in its final conclusions." President Monroe, for it is of him I speak, understood, if I may venture a personal opinion, better than most American statesmen the foreign policy of the United States and their domestic relations as States of the Federal Union. He has two doctrines to his credit, set forth in his messages to Congress. The message containing his views on foreign affairs—the more famous of the two—was his annual message of 1823; the other and more elaborate was a special message of 1822, and in it he formulated what may be called his domestic doctrine. In it, he first states two results of the Declaration of Independence:

[14] For President Washington's tour of the Southern States during 1791, see the recent and interesting account by Archibald Henderson, *Washington's Southern Tour, 1791* (1923).

The first is that in wresting the power, or what is called the sovereignty, from the Crown it passed directly to the people. The second, that it passed directly to the people of each colony and not to the people of all the colonies in the aggregate; to thirteen distinct communities and not to one. To these two facts, each contributing its equal proportion, I am inclined to think that we are in an eminent degree indebted for the success of our Revolution.[15]

In President Monroe's opinion this conception of things is fundamental, and in a later passage of the same state paper, he recurs to it and restates it in more definite and precise terms, if that were possible:

And that the power wrested from the British Crown passed to the people of each colony the whole history of our political movement from the emigration of our ancestors to the present day clearly demonstrates. What produced the Revolution? The violation of our rights. What rights? Our chartered rights. To whom were the charters granted, to the people of each colony or to the people of all the colonies as a single community? We know that no such community as the aggregate existed and of course that no such rights could be violated.[16]

It is, I think, abundantly clear that we are dealing with thirteen independent States, claimed to be such by their Declaration of Independence of 1776, and recognized as such by the Mother Country in the Treaty of Peace of 1783.

We are now in a position to see how the express Union of the Articles of Confederation gave rise to a system of arbitration, just as the unconscious union of the nations under the Pacific Settlement Convention of The Hague produced a court of arbitration in the midst of the independent powers of 1899, and how the more perfect Union of the Constitution brought into being the Supreme Court of the States, just as the conscious and closer union of the

[15] Views of the Presidents of the United States on the Subject of Internal Improvements—Stanislaus Murray Hamilton, *The Writings of James Monroe*, 1902, vol. VI, p. 224. See also James D. Richardson, *Compilation of the Messages and Papers of the Presidents*, 1789–1897 (1896), vol. II, p. 149.

[16] Hamilton, *ibid.*, p. 225; Richardson, *ibid.*

nations under the Covenant of the League facilitated the creation of the Permanent Court of International Justice. Therefore, before taking up in detail the system of arbitration and the Supreme Court of these United States, I invite your attention to the Union of the Articles of Confederation and of the Constitution.[17]

We have seen, from a decision of the Supreme Court of the United States, that Virginia proclaimed its independence of Great Britain and claimed and exercised the rights of a free, sovereign, and independent nation in the sense of international law. But Virginia was not alone in cutting loose from the Old World and the old way of doing things. On March 26, 1776, the Provincial Congress of South Carolina adopted a constitution for that colony and elected and set up a government independent of royal authority, of which John Rutledge was the head, under the title of President. Without overdoing this phase of the question, let me take two examples of like action north of Mason and Dixon's line, so that it will appear that we are dealing with a general and not with a sectional doctrine. The devotion of New England to the Federal Union is not open to suspicion, and if Virginia and South Carolina of the South, and Connecticut and Massachusetts of the North broke with Great Britain and set up for themselves, they did so, it is reasonable to suppose, in the belief that the sovereign rights of the Crown passed without exception to each of the colonies upon its declaration of independence from the Mother Country. Let us therefore see the action taken by these two representative States of the North, and then sum up the situation by a decision of the Supreme Court of the States in their united capacity, which would seem to settle the matter in so far as the decision of a court of justice can settle anything.

The action of Connecticut is of especial interest in that

[17] See Appendix II, Nos. 1 and 2, pp. 262–266.

it lived under the original charter from the Crown, and so happily that on proclaiming its independence of Great Britain it continued the charter as its instrument of government, recognizing, however, the people of the State instead of the Crown as the source of authority. The preamble states the fact and theory of the New World; the statute applies them and draws the necessary consequences with admirable precision and brevity. The action of Connecticut is important from another point of view, because it was taken after the Declaration of Independence of the Continental Congress, and shows that Connecticut then considered itself a State of international law, deriving its rights from a higher source than the Declaration. But the preamble and the first paragraph of the Constitution of Connecticut make this clearer than any possible comment. Therefore, let me read the opening words of the preamble:

> The People of this State, being by the Providence of God, free and independent, have the sole and exclusive Right of governing themselves as a free, sovereign, and independent State; and having from their Ancestors derived a free and excellent Constitution of Government whereby the Legislature depends upon the free and annual Election of the People, they have the best Security for the Preservation of their civil and religious Rights and Liberties. . . .

The first paragraph of the Constitution consists of two weighty sentences, the first stating specifically the source of their right and the second its consequence. The opening sentence runs literally, in very familiar language:

> *Be it enacted and declared by the Governor, and Council, and House of Representatives, in General Court assembled,* That the ancient Form of Civil Government, contained in the Charter from *Charles* the Second, King of *England,* and adopted by the People of this State, shall be and remain the Civil Constitution of this State, under the sole authority of the People thereof, independent of any King or Prince whatever.

In the concluding sentence, the good people of Connecticut thus describe the result of their action, "And that this

Republic"—the word is theirs, not mine—"is, and shall forever be and remain, a free, sovereign and independent State, by the Name of the STATE of CONNECTICUT." Were it not discourteous and a reflection upon the size of the Republic, one might be inclined to ejaculate that the smaller the State the greater the claim.

The action of Massachusetts is interesting from various points of view. It was taken in 1780 after the Articles of Confederation had been drafted by Congress but before they became the law of the land by the adherence of Maryland, the last of the thirteen original States to approve them. It was not only in harmony with the American theory that the State is a compact of its members, but in express accordance with the American theory of a Constitution which, it is to be hoped, will never be discarded for the European conception of a fundamental act of government. A single phrase of the Massachusetts Constitution will do for the immediate purpose in hand: "The people inhabiting the territory formerly called the Province of Massachusetts Bay do hereby solemnly and mutually agree with each other to form themselves into a free, sovereign, and independent body-politic, or State, by the name of The Commonwealth of Massachusetts."

Let us now invoke the authority of the Supreme Court. In 1808, some thirty years after the Declaration of Independence had been proclaimed and some twenty years after the Government of the more perfect Union had gone into effect and was succeeding beyond expectation, the status of a resident of New Jersey after the Declaration of Independence came up, and, in deciding it, the status of New Jersey was determined. The judgment of the Court was unanimous, and its opinion was delivered by a distinguished jurist of New England, in politics a Federalist of the Washington type. At the time of his appointment by President Washington as an original

Justice of the Supreme Bench, he was the first Chief Justice of Massachusetts under the Constitution of 1780, and he would have served as Chief Justice of the Supreme Court of the United States, to which post he was commissioned without his knowledge by President Washington, in succession to Jay and Rutledge, and immediately confirmed by the Senate, had he not declined the proffered honor. Mr. Justice Cushing was therefore a man of experience, without ambition other than to perform the duties of a judge, and in favor of the national or "consolidated" government, to use the language of the time. I have mentioned these facts as they seem to me to add weight to the opinion which he delivered in behalf of the Court. It should also be mentioned that the case was elaborately argued at a previous term, and that it was re-argued before judgment was rendered. Therefore, it is one of more than ordinary authority. It appears that, on October 4, 1776, a law of the State of New Jersey declared that all persons then residing in the State owed it allegiance. Daniel Coxe was born in, and was a resident of New Jersey at the time of its passage, although he later adhered to the British cause. In the part of the opinion announcing the judgment of his brethren in *McIlvaine* v. *Coxe's Lessee*, the learned Justice said:

> Daniel Coxe lost his right of election to abandon the American cause, and to adhere to his allegiance to the king of Great Britain; because he remained in the state of New Jersey, not only after she had declared herself a sovereign state, but after she had passed laws by which she pronounced him to be a member of, and in allegiance to, the new government. The court entertains no doubt that after the 4th of October, 1776, he became a member of the new society, entitled to the protection of its government, and bound to that government by ties of allegiance.[18]

This is a general principle; but Mr. Justice Cushing shows

[18] 4 Cranch, 209, 212 (1808).

the special reason for its enunciation and the reason why the British subject was bound by a law of New Jersey of October, 1776, passed after its independence. It is to be borne in mind that the imperfect Union under the Articles of Confederation was not then in being, and if New Jersey was a State in the conception of international law, it was because it became so by its own act and not by virtue of any subsequent provision of these Articles.

"This opinion," the Court continues, "is predicated upon a principle which is believed to be undeniable, that the several states which composed this Union, . . . became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that they did not derive them from concessions made by the British king. The treaty of peace contains a recognition of their independence, not a grant of it. From hence, it results, that the laws of the several state governments were the laws of sovereign states, and as such were obligatory upon the people of such state, from the time they were enacted."

In the introductory lecture, I mentioned in passing that Virginia had ratified the treaties of amity and commerce and alliance concluded with France on February 6, 1778. I should like to recur to this action on the part of that State, which then shared with Massachusetts the leading position among the American Commonwealths. The ratification of the treaties by Virginia was an assertion of its sovereignty before the Articles of Confederation were adopted, just as the proclamation of neutrality by Massachusetts after their adoption was the exercise of sovereignty on the part of that State.

Let us first consider the procedure of Virginia. This State was a party to the treaties with France. The preambles mention the States, including Virginia, as contracting parties, and one of its citizens, Arthur Lee, "Councel-

lor at Law," was a plenipotentiary and negotiator on behalf of the States.

The Congress ratified the treaties on May 4, 1778, the day on which they were laid before that body.

On June 2, 1779, the House of Delegates of Virginia

Resolved, nemine contradicente, that it is the opinion of this committee that the treaties of alliance and commerce entered into between His Most Christian Majesty of France on the one part, and the Congress of the United States of *America* on behalf of the said states on the other part, ought to be ratified and confirmed, so far as is in the power of this commonwealth, and the same are accordingly hereby ratified, confirmed, and declared binding on this commonwealth.

Resolved, that the Governour be desired to notify to the Minister of His Most Christian Majesty, resident at *Philadelphia,* the above ratification under the seal of the commonwealth.[19]

On June 3rd, the resolution of the House of Delegates was laid before the Senate of Virginia, where it was agreed to on the following day.[20]

On the 8th of June, the Governor of the State transmitted the act of ratification with a covering letter to M. Conrad-Alexandre Gérard, French Minister in Philadelphia, who, in turn, transmitted them to the Comte de Vergennes, then Minister for Foreign Affairs of France. In the course of his letter, M. Gérard, who had the year before negotiated the two treaties on behalf of his country, said:

On the 20th of this month the Virginia delegates in a body delivered to me in behalf of their State a package containing a letter from the governor of that Commonwealth and an authentic copy of the Act passed by a unanimous vote of the two legislative branches for the ratification of the treaties concluded between the United States and the King and declaring them binding on the Commonwealth.[21]

[19] *Journal of the House of Delegates of Virginia,* 1779 (Williamsburg), pp. 39–40.

[20] *Journal of the Senate* [of Virginia], 1779 (Williamsburg), pp. 21, 22.

[21] Henri Doniol, *Histoire de La Participation de La France à L'Etablissement des Etats-Unis d'Amérique,* vol. IV (1890), p. 155 note (Translation). For M. Gérard, see Wladimir D'Ormesson, *La Première Mission Officielle de la France aux Etats-Unis* (1924).

These documents are to-day in the Ministry of Foreign Affairs at Quai d'Orsay, where they were recently examined at my request. They were found to be intact, still bearing the seal of the Commonwealth of Virginia.[22] It is not without interest to observe that these papers bear the signature of Thomas Jefferson, at that time Governor of Virginia, and who three years previously had drafted the Declaration of Independence, to be made effective by the treaty of alliance with France, of which he transmitted the instrument of ratification in behalf of his State. It is to be presumed that he knew the meaning of the Declaration and that he thought his actions to be in accordance with its terms.

We may perhaps say of Jefferson's letter, with its precious enclosures in Quai d'Orsay, what Macaulay in his *Lays* says of the "molten image" of Horatius in the Eternal City:

> And there it stands unto this day
> To witness if I lie.

Without laboring the matter further, it is abundantly clear that the States after the Declaration of 1776 were free, sovereign, and independent, and that they remained

[22] In response to a more recent request, Professor Jules Basdevant, of the Faculty of Law of the University of Paris, under date of October 17, 1924, gives the following interesting information:

"Je suis arrivé enfin à decouvir les documents qui vous intéressant au sujet de la ratification par la Virginie du traité de 1778 entre les Etats-Unis et la France.

"Nos archives possèdent

1° la résolution de l'Assemblée générale de Virginie du 4 juin 1779 avec la signature de Jefferson et le sceau (celui-ci en mauvais état);

2° la lettre d'envoi de Jefferson du 8 juin 1779.

"Il y a bien aussi la lettre par laquelle notre Ministre en Amérique a transmis ces documents à Paris, lettre dont l'essentiel est reproduit par Doniol, t. IV, p. 155.

"J'ai eu quelque difficulté à trouver ces documents, tout d'abord parce que la référence à Doniol que vous m'aviez donnée de mémoire était légèrement erronée, ensuite parce que j'ai trouvé des copies alors que je cherchais des originaux. Mais en poursuivant mes recherches dans un fonds que Doniol ne semble pas avoir utilisé, j'ai trouvé les originaux des deux pièces. . . .

"Laissez-moi ajouter que je suis très heureux d'avoir découvert ces documents, d'autant plus que j'avais craint tout d'abord de ne rien trouver puis de n'avoir que des copies. Ma joie a été très grande de mettre la main sur les originaux."

so, in the sense of international law, until they changed that status by their subsequent, and, as we shall see, voluntary act.

The first act by which the American States changed their legal relation to one another dates from March 1, 1781, when the last of the thirteen signed the Articles of Confederation, thereby replacing the Union in fact, which had existed from the declaration of their independence on the 4th of July, 1776, by a Union in law.

The situation is admirably stated by Mr. S. E. Morison, a New England scholar who holds the chair of American History in the University of Oxford. In the introduction to his little volume of *Sources and Documents illustrating the American Revolution 1764–1788 and the formation of the Federal Constitution* (1923), he says: "the people of the states were of no mind to part with the powers they had taken over from the Crown and Parliament. During the first two years of the war, the Continental Congress wielded considerable power without express authority. Constitutionally, it was little more than a supreme war council of thirteen allies." There can be no doubt that Professor Morison accurately states the case, and he and we, with the War Council of the World War before our eyes, know what that means. His next statement is, "The Articles of Confederation drafted in 1777 but not ratified . . . until 1781, legalized the existing situation." This is true in the sense that the Articles sought to legalize the situation but did not actually do so until their final adoption. In the meantime, the consent of the States to the recommendations of the Congress was the source of such government as can be said to have existed.[23] His next

[23] In speaking of the Continental Congress which proclaimed the Declaration of Independence, Mr. Justice Paterson has this to say in the same case:

"The powers of congress were revolutionary in their nature, arising out of events, adequate to every national emergency, and co-extensive with the object to be attained. . . . The danger being imminent and common, it became necessary for the

statement is true in fact until 1781, and after then in law as well. "Congress, as organized in 1774, remained the sole organ of the Confederacy, and, in general, was granted only those powers which, before 1775, the Crown and Parliament had exercised without question." "The states," he adds, "retained full control over taxation, commerce, and customs duties."[24]

Let us look at the imperfect Union of the Articles, and at some of their provisions. However imperfect, the Union of the thirteen States was to be "perpetual"; it was to be a confederacy under the "stile" of the United States of America. The Union was of sovereign, free, and independent States which retained the exercise of all sovereign powers not "expressly delegated to the United States in Congress assembled." The confederacy was, according to the Articles, "a firm league of friendship with each other" for common defense and welfare against all attack from the outside.[25] We are dealing with a group of States united for a definite purpose, but for none other. We are not dealing with a nation or a unitary State. To exercise the delegated powers of a very general kind, each of the States was to appoint not less than two nor more than seven delegates to the Congress, paid by the States appointing them; and each State was to have but one vote in Congress assembled. We have here a diplomatic not an organic union.

people or colonies to coalesce and act in concert, in order to divert or break the violence of the gathering storm; they accordingly grew into union, and formed one great political body, of which congress was the directing principle and soul." 3 Dallas, 54, 80, 81.

[24] Morison, *Sources and Documents*, p. xl.

[25] "It must be recollected, that previous to the formation of the new constitution, we were divided into independent states, united for some purposes, but in most respects, sovereign." Chief Justice Marshall in *Sturges* v. *Crowninshield*, 4 Wheaton, 122, 192 (1819).

"As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true." Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheaton, 1, 187 (1824).

Of this Union, the State was the unit; and the people of each, the source of power. Each State led its own life under a government then and now meeting the requirements of international law.

The States, through their delegates in Congress, specifically renounced the exercise of certain powers of the nations of international law, and of other powers, in the interest of the Union, and of the States themselves; they recognized the necessity of presenting an unbroken front to the outer world, and therefore delegated to the Congress the exercise of certain powers for this purpose. They prescribed the manner in which Congress should exercise the delegated powers and carry on the government of the confederacy; and they bound themselves to "abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them."

Of each of these in turn. The States renounced the right without the consent of Congress to send any embassy to, or receive "any embassy from or enter into any conference, agreement, alliance or treaty" with, any foreign State; at the same time they renounced the right to enter into any treaty or alliance with one another without the consent of Congress, specifying its purpose and duration. That is to say, the Congress was to handle the foreign relations of the confederacy and the States were not to deal directly with one another as nations.

In the next place, the States were not to maintain a navy or army, except for defense and then only with the consent of Congress, although the right to a militia was not surrendered. The States gave up the right to engage in war without the consent of Congress, unless invaded and unless the danger was too imminent to admit of the delay to obtain the consent of Congress; the States renounced in general the incidentals of warfare; and the

expenses of the common war were to be defrayed from the common treasury from payments made by the States according to the value of the land situated within each of the United States.

The rights thus relinquished were delegated to the Congress, such as to declare war, make peace, conclude alliances, and to conduct the foreign relations of the confederacy, to appoint "courts for the trial of piracies and felonies committed on the high seas," and to establish courts of appeal in prize cases.

Recognizing that disputes between States were in their day only adjusted by negotiation or terminated by war, the framers of the Articles vested in Congress the peaceable settlement of disputes of all kinds arising between and among them, as a substitute for diplomacy and the sword, by a method later to be described in some detail. The leaders of the American Revolution were men of affairs; they saw facts as they were; and they created institutions in order to meet the situation with which they were confronted. A great Chief Justice—many consider him the prince of modern judges—did he not express this condition in a sentence, when he said, "There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest."[26] To meet this situation, the Court of the States was to be the substitute for diplomacy and war.

When in session, the Congress acted as a body, and important questions required the vote of nine States. During the recess of the Congress, a committee of one from each State was authorized to carry on the business of the confederacy, with the exception of the important matters requiring the vote of nine of the States. The determinations

[26] Chief Justice Marshall in the case of *Foster* v. *Neilson*, 2 Peters, 253, 307 (1829).

of the Congress were to bind each State; each pledged itself to observe the Articles of Confederation and the amendments made to them in Congress and ratified by the legislatures of all the States.

The proclamation of neutrality which Massachusetts issued in 1784, midway between the final ratification of the Articles of Confederation in 1781 and the framing of the Constitution in 1787, shows beyond peradventure the way in which the people of that day thought of their States — at least how the government of Massachusetts acted under the menace of a breach of the peace by its immediate neighbors.

I owe this interesting incident to Mr. Charles Warren, who a month ago used it on a similar occasion and for a like purpose, in a course of lectures on sovereign States and the Supreme Court. New Hampshire and New York claimed the territory now forming the State of Vermont; and, in the very year of the treaties with France, these two sovereignties formed "a secret agreement to divide the state [of Vermont] between themselves." This plan was abandoned, owing chiefly, it would seem, to "the general success of the American cause. . . . The difficulties with New Hampshire were adjusted in 1782 . . . but New York refused to abandon her claims until 1790." [27] The peace with Great Britain left New York "a free hand"—to use a time-honored phrase of diplomacy—and war between the recognized State of New York and the unrecognized State of Vermont seemed imminent. In this posture of affairs, Massachusetts, which had recognized the independence of Vermont in 1781, issued the following proclamation of its neutrality:

> Whereas an unhappy dispute has subsisted between some of the citizens of the State of New York and the people inhabiting the territory

[27] "Vermont," *The Encyclopaedia Britannica*, vol. xxvii (eleventh edition, 1911), pp. 1025–1029.

called the New Hampshire Circuits or State of Vermont, and it being probable from the present disposition of the parties that the same controversy may be recommended, to the great distress and calamity of all concerned therein, and there being great reason to fear that some citizens of the Commonwealth who live on the borders of the said State of Vermont may, by uncautiously intermeddling with the contention, involve themselves and families in that distress which is at all times the consequence of civil dissentions, unless care is taken to prevent it.

I have, therefore, at the request of the General Court, thought fit to issue this Proclamation, commanding and enjoining it upon all the citizens of this Commonwealth that in all and every controversy now existing or that may hereafter exist between the citizens of New York and the people inhabiting the new State, or between any of them, in whatever form or manner the same may exist, they, the citizens of this Commonwealth, conduct themselves according to the strictest rules of neutrality, and that they give no aid or assistance to either party, but that those who live on the borders of the said State and within this Commonwealth sell to each party indifferently such things as they have to sell without giving preference to either; that they send no provisions, arms, or ammunition or other necessities to a fortress or garrison besieged by either party. And all the citizens and inhabitants of this commonwealth are absolutely and most solemnly forbidden to take arms in support of or engaging in the service or contributing to the conquest, success, or defence of either of the said parties, as they will answer it at their peril.[28]

This remarkable document is dated March 26, 1784. Massachusetts had acted in advance of the anticipated danger, for on April 26th—a month to a day—Thomas Chittenden, the then Governor of Vermont, moved by a resolution of the New York Legislature,[29] addressed the

[28] Charles Warren, *The Supreme Court and Sovereign States* (Princeton, 1924), pp. 11–12.

"Those who had an opportunity of seeing the inside of the transactions which attended the progress of the controversy between this State and the district of Vermont, can vouch the opposition we experienced, as well from States not interested as from those which were interested in the claim; and can attest the danger to which the peace of the Confederacy might have been exposed, had this State attempted to assert its rights by force." Alexander Hamilton in *The Federalist*, No. 7, November 17, 1787. Paul Leicester Ford's edition (1898), p. 36.

[29] "It appears from the late journals of the Senate of the state of New York, 'That the Delegates be further instructed to press Congress for a decision in the

President of Congress, then Thomas Mifflin of Pennsylvania, and assured him that "Vermont does not wish to enter into a war with the state of New York, but that she will act on the defensive; and expects that Congress and the twelve states will observe a strict neutrality, and let the contending states settle their own controversy."

The trouble was ended, as troubles of that kind could best be ended, by the entrance of Vermont into the federation of the American States in 1791.

It is to be observed that, in the opinion of Vermont, the States were justified in declaring their neutrality under the Articles of Confederation, and, indeed, that incipient Commonwealth expected and requested such action on the part of the sovereign States. It is to be further observed that the then Governor of the State of Massachusetts was none other than John Hancock, President of the Continental Congress which adopted the Declaration of Independence, whose name is affixed in such a bold hand to that instrument as to give rise to, if it does not wholly justify, the jocular remark, to put "your John Hancock" to a paper, instead of the more formal and dignified request to sign.

The Articles of Confederation, whether before or after their ratification, left intact, it would seem, the sovereignty of the States.

In speaking of the Articles as a whole, Professor Morison ventured the prediction, which can neither be affirmed nor denied, as time was not vouchsafed for the experiment, that the "Confederation might have developed into an efficient federal government had not the process of

long protracted controversy respecting the right of this state to the district commonly called the New-Hampshire Grants.' And further, 'But that if she must recur to force for the preservation of her lawful authority, the impartial world will pronounce that none of the bloodshed, disorders or disunion which may ensue, can be imputable to this Legislature.'" Extract from letter of Governor Chittenden. *The Massachusetts Centinel,* December 4, 1784.

amendment been so difficult, and the times out of joint."[30] However this may be, a federal Convention met in the latter part of May, 1787, in Philadelphia, as a result of the urgent and persistent efforts of Alexander Hamilton of New York and of James Madison of Virginia, with the approval and support of George Washington, likewise of that Commonwealth. This Convention of delegates of the several States was, as stated in the resolution of the Congress of February 21, 1787, calling it "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union." The Convention, composed of delegates appointed by twelve of the States — Rhode Island did not attend—acting under instructions from their respective States, opened May 25th. George Washington was chosen President; the credentials of the delegates were read and found to be in due form. The States voted as States, individually—Virginia, the largest, as Delaware, the smallest of the Convention, each casting but a single vote; and the Convention adjourned on the 17th of September, 1787, with the draft of the Constitution of these United States to its credit.

It would perhaps be difficult to find a more "taking" definition of a constitution than the following:

> A constitution is but a law; it emanates from the people, the depositary and the only one, of all political power; it is, therefore, the supreme law. It organizes and defines the different parts of the government, confers on each department the powers and duties allotted to each, and limits the powers of every department. It has this further quality: having distributed the different powers to the different departments, it leaves those powers to be erected by those departments, and

[30] Morison, *Sources and Documents illustrating the American Revolution,* introduction, p. xl.

leaves to the sovereign people themselves no other power than that of choosing their own officers or representatives. The people can do no act, except make a new Constitution or make a revolution.[31]

In speaking of the Massachusetts Constitution, it was stated that it is of the American type, and the first of its kind. The American Bill of Rights is a declaration of the rights which are or should be inherent in man as man; and the American Constitution is the means through which these rights are rendered effective and protected against a popular or legislative majority. This characteristic has been admirably stated by the late Professor Jellinek, under whom I had the honor to study at the University of Heidelberg. In *The Declaration of the Rights of Man and of Citizens*—which I wish every American would read and, if it is not too much to ask, would learn by heart—he says, "In the Union as well as in the individual states, there are separate organs for ordinary and for constitutional legislation, and the judge watches over the observance of the constitutional limitations by the ordinary legislative power. If in his judgment a law infringes on the fundamental rights, he must forbid its enforcement.[32] The dec-

[31] Mr. Justice Huston in *Commonwealth* v. *Collins*, 8 Watts (Penna.), 331, 349 (1839).

In *Vanhorne* v. *Dorrance*, 2 Dallas, 304, 308 (1795), Mr. Justice Paterson uses language which admirably defines the relations between the constitution of a State, and a statute of its legislature:

"What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are legislatures? Creatures of the constitution; they owe their existence to the constitution: they derive their powers from the constitution: it is their commission; and therefore, all their acts must be conformable to it, or else they will be void. The constitution is the work or will of the people themselves, in their original, sovereign and unlimited capacity. Law is the work or will of the legislature, in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature."

[32] "The true doctrine, as we conceive, is this, that whilst the States are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Constitution and constitutional laws of the latter are . . .

larations of rights even at the present day are interpreted by the Americans as practical protections of the minority. This distinguishes them from the 'guaranteed rights' of the European states. The American declarations are not laws of a higher kind in name only; they are the creations of a higher lawmaker." The distinction between fundamental and ordinary rights is indeed recognized in the Old World, and it is more difficult to change the former than the latter; but, as Professor Jellinek says, "almost everywhere it is the lawmaker himself who decides upon the change."[33]

The honor of drawing the distinction in practice if not in theory belongs to the good people of the little town of Concord in the State of Massachusetts, where, scarcely more than a year earlier, the embattled farmers had fired the shot which still reverberates throughout the world. I wish I could quote in its entirety the resolution of the inhabitants at the town meeting of October 21, 1776. It is in part:

> the Inhabitents of the Town of Concord being free & twenty one years of age and upwards . . .
>
> Resolved as follows—
>
> . . . 2 That the Supreme Legislative, either in their Proper Capacity, or in Joint Committee, are by no means a Body proper to form & Establish a Constitution, or form of Government; for Reasons following. first Because we Conceive that a Constitution in its Proper Idea intends a System of Principles Established to Secure the Subject in the Possession & enjoyment of their Rights and Priviliges, against any Encroachment of the Governing Part—2 Because the Same Body that forms a Constitution have of Consequence a power to alter it.

the supreme law of the land; and when they conflict with the laws of the States, they are of paramount authority and obligation. This is the fundamental principle on which the authority of the Constitution is based; and unless it is conceded in practise, as well as theory, the fabric of our institutions, as it was contemplated by its founders, can not stand." Mr. Justice Bradley in *Ex Parte Siebold,* 100 United States, 371, 398–399 (1879).

[33] Georg Jellinek, *The Declaration of the Rights of Man and of Citizens* (1895), English authorized translation from the German by Max Farrand (1901), pp. 47–48.

3—Because a Constitution alterable by the Supreme Legislative is no Security at all to the Subject against any Encroachment of the Governing part on any, or on all of their Rights & priviliges.[33A]

The meeting recommended that members of a Convention to form a Constitution be elected by the people of the State being free and twenty-one years of age and upwards, and that the proposed Constitution be published "for the Inspection & Remarks of the Inhabitents of the State."

The Federal Convention was composed of members from each of the States; the proposed Constitution was submitted to conventions of the people in each of the States; and the principles of the Constitution were safeguarded against "the Supreme Legislative, either in their Proper Capacity or in Joint Committee," as the wise men of Concord recommended, by requiring an amendment to be proposed by two-thirds of both Houses of Congress and ratified by the legislatures or special conventions of three-fourths of the States. The Congress should not have power to determine whether a law of the Congress violated a provision of the Constitution, as that would mean that the Congress passed on the propriety of its own action. The Supreme Court of the States is authorized, as their judicial agent, to pass upon the action of their political agents. In addition, as will appear shortly, the Supreme Court of the States was authorized to entertain and decide controversies between the States, and controversies to which the government of the United States should be a party.

It is not necessary for present purposes to enter into the details of the Constitution. It is sufficient to say that the Union of the confederacy is rendered more perfect by a delegation to the government of the Union of certain powers expressly stated or implied; that legislative powers are exercised by a Congress of two branches, a Senate, to

[33A] Facsimile of Resolution, frontispiece, *The Commonwealth of Massachusetts, A Manual for the Constitutional Convention,* 2nd edition, 1917.

which the people of each State as such, regardless of population, elect two members, and a House of Representatives, to which the people of each State elect members according to its population; that the executive powers are exercised by a President elected indirectly by the people of each of the States, for a period of four years; that the judicial powers delegated to the government of the Union are exercised by a Supreme Court and such inferior courts as the Congress may from time to time establish; that the States renounced the exercise of some powers thought to be opposed to the welfare of the Union; and, finally, that all powers not expressly or impliedly delegated to the United States remain in the States or the people thereof.

One further observation may be made, and it is of the utmost importance. The government of the Union acts upon the individual directly, in so far as it possesses and exercises power under the Constitution, not directly upon the State and through it upon its inhabitants. In this way, the individual is reached and coerced, if need be, without attempting to coerce the State which Madison declared on the floor of the Federal Convention to be an exploded idea. The Court not the army is the agent, and the right or the wrong of an act is determined by the Court. If the statute under which the individual claims to act is lawful, his action is lawful; if unlawful, his act is illegal. In one case, he has the protection of the law; in the other, he is without its protection. This is all there is to it; but simple as it seems to be, no Court was ever vested with more transcendent power, for it declares in the course of a suit at the instance of an individual an act of Congress, the provisions of a Constitution of a State or Statute of its legislature, null, void, and of no effect, as being in violation of the national Constitution, which is expressly declared to be the supreme law of the land, that is, the supreme law of each and every State of the Federal Union.

THE STATES AND THE UNITED STATES

I ask your indulgence to some observations of a general nature, which would be out of place were it not for the special purpose of these lectures. The origin and nature of the Articles of Confederation forming an imperfect union and of the Constitution creating a more perfect union, are of interest only to Americans, if the States were never sovereign in their individual capacity, and if they did not retain to themselves and their citizens the exercise of the sovereign powers not surrendered or renounced in the various articles of the Constitution of the United States. On the other hand, the origin and nature of the Confederation and of the Constitution, and the history of the United States, especially under the latter, are of interest to the world at large, and may be of inestimable value to the continent of Europe the moment it appears that we are dealing with sovereign States.

The American Union is a union of States, not of the people divided into States. The State is the unit, not the people; and the States, not the people, form the United States of America. The States were the contracting parties; they appointed their delegates to the Federal Convention, who voted as States, and the Constitution was thus in first instance drafted by the States. The Convention of the States referred it to the Congress of the States, and this representative of the States referred it to the thirteen original States. By conventions of the people of each of the States—not by the people as a whole—the Constitution was ratified. It was thus a Constitution for the United States, not for the united people; for the people of the United States are the sum totals of the citizens of the several States in their united capacities.

An illustration of the practical working of the Constitution may not be amiss. The entire legislative branch of the United States is elected by the States, or, rather, by "the people"—the two Senators from each State directly by the

people of the State; the members of the House of Representatives from districts within each of the States. The Chief Executive, the President of the United States, is not chosen by the American people "compounded into one common mass" but by electors of the various States, themselves chosen by the States, of which they are citizens, and voting within the States. The federal judges forming the judiciary of the United States are, in first instance, appointed by the President, but the appointment becomes effective upon confirmation of the Senate, representing the States of the Union. And the men of America, young and old, who have given their lives both at home and abroad that this "indestructible Union, composed of indestructible States," might not perish, fell under a Flag with a Star for each State, and lie buried within its sacred folds.

That the States, not the people as a whole, made the Constitution, would be too clear for argument, had it not been argued; and by many persons who, beginning with the preamble, have read to the end and pondered the entire document. "We the People of the United," the preamble begins, and ends with the phrase, "do ordain and establish this Constitution for the United States of America." Unless "the People" means the people of the ratifying States, there is an inconsistency between the opening words of the preamble and the closing phrase; and there is a very striking inconsistency between the preamble and the seventh Article stipulating that "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." The Constitution is, therefore, by its express wording, the Constitution of the States ratifying it, and the people who "ordain and establish" it can only be the people of the States ratifying the instrument.

A short but an unsatisfactory way out of the difficulty would be to dismiss the preamble with the simple state-

ment that it is without effect in law, and that the only delegation of powers to the government of the Union is in the Articles of the Constitution, as the Supreme Court has expressly decided in a recent case.[34]

It is better, however, to open Madison's *Debates* and see how it happened. On August 6th, the Committee of Detail reported the first draft of the Constitution to the Convention. Its preamble reads literally, and in its entirety:

> We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

The first article of the draft reads:

> The stile of the Government shall be, "The United States of America."

The framers were not creating the United States, they existed in union under the Articles of Confederation; they were, however, devising a more effective government of the Union of existing States, under the name of the United States of America.

On August 7th, the Convention took up the draft. The preamble of the report was agreed to "nem. con.," as Madison reports. Article 1 was likewise adopted without modification. This ended matters so far as the preamble and the first article were concerned. They are never mentioned again. The draft was debated article by article, and many and important changes were made in its text. On September 8th, the document as amended was referred to the Committee on Style, to be put into shape and reported back. The preamble and first article were passed to

[34] *Jacobson* v. *Massachusetts*, 197 United States, 11 (1905).

the Committee in their original and unamended form. When the Constitution came back, the preamble and the first article of the draft were merged into the preamble as we have it. The names of the States were omitted. Why? Because the Constitution was to go into effect when nine States ratified it, and for those so ratifying it. Nobody could predict what States would take favorable action. Rhode Island had not been represented in the Convention; North Carolina had been represented, but did not ratify. New York in the north, and Virginia in the south, ratified after bitter and prolonged struggles, and only after New Hampshire, the ninth State, had put the Constitution into effect for the nine.

Under the circumstances, the Committee on Style kept the opening phrase of the original draft, "We the People of the States," omitting the names of the States and prefixing in lieu thereof, the word "United." The result was, and is, the language with which we are familiar, "We the People of the United States." The Committee further kept the commanding words "ordain and establish," rejecting "declare" as unnecessary.

The new preamble passed unnoticed—at least it is not mentioned in Madison's *Debates*, or elsewhere. The members of the Convention were intent in the closing days—as is always the case in conferences—on changes of substance. There is no reason to believe that the members marked the modification, but if they did, they doubtless felt then, as we do now, that it was of form, not of substance; and for the better, not for the worse. If Madison or any other member had thought for a moment that the modified preamble would give rise to an interpretation of the instrument substituting the American people as a whole for the people of the ratifying States, the Convention would assuredly have debated it word for word.

It was foreseen that the relations of the States to the

Union might need to be changed, and the Constitution therefore provided for its amendment. Here again, it is the States which take the initiative. The Constitution is to be changed as it was made, through the initiative of the Congress and the votes of the States. The Congress of the Confederacy proposed that the articles be modified to meet the needs of the country, through the meeting of delegates of the States in a Federal Convention. The Congress of the Constitution recommends an amendment to the States, by a two-third vote of the House and the Senate; and, when adopted by the legislatures or special conventions in three-fourths of the States, the amendment to the Constitution is adopted and becomes a part of that instrument. One provision of the Constitution can not, however, be amended, and naturally enough it concerns the States and their equality of representation in the Senate. The Constitution was made by the several States; it is to be changed by the several States. It was to go into effect when three-fourths of the original States ratified it, but only for the States ratifying; it is to be amended by three-fourths of the present States, and for all the States. It is a question of States, and of the people of the United States as citizens of the several States.

There is a further matter which should be mentioned in this connection: the objections to the Constitution which militated against its original adoption and the amendments which were passed to assure the States, by express provisions added to the Constitution, that only the powers of sovereignty granted to the Union by the States passed to its government, and that all other powers of sovereignty remained with the States, to be exercised by them unless, as in certain specified cases, they renounced their exercise. To most members of the Convention this clearly appeared from the text, and in their opinion the Constitution was in the nature of a bill of rights. This view was the view of

Alexander Hamilton of New York—it was not that of George Mason of Virginia, who wanted a bill of rights prefixed to the instrument. Defeated in the Federal Convention in its closing days, he succeeded in the Convention of Virginia, and in the conventions of other States, in having a bill of rights added to the Constitution by way of further assurance. Ten of the twelve amendments proposed by the first session of the first Congress under the Constitution were adopted. The faithful and upright Madison proposed the amendments, and within three years they were ratified and thereupon became integral parts of the Constitution.

For our purpose there are only two of the ten which require a word of explanation. They are the ninth and tenth, added as general limitations of federal power after its specific limitation in the previous amendments. They go to the heart of the matter, and show that, in the opinion of at least three-fourths of the States of that day, the government was one of enumerated powers, and that it could not claim — at least could not legally exercise — powers not specifically enumerated or resulting from necessary implication from the powers enumerated. These amendments are:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.—ARTICLE IX.
>
> The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.—ARTICLE X.

Of the twelve amendments, all were adopted with the exception of the first two. The eleventh and twelfth became the ninth and tenth. No returns were made by Massachusetts, Connecticut, and Georgia. The other original States —ten in number—voted for articles nine and ten, which were thus adopted without a dissenting vote. The tenth

amendment, as introduced by James Madison in the House of Representatives on June 8, 1789, reads: "The powers not delegated by this Constitution nor prohibited by it to the States are reserved to the States respectively." This was the gist of the amendments voted by those State Conventions that wanted further assurance before committing their States to the original Constitution.[35]

Five of the eleven States originally ratifying the Constitution had included a reservation to that effect. The Convention of Maryland was inclined to a similar resolution,[36] but did not include it in the instrument of ratification, and an insistent minority in Pennsylvania had championed a strongly-worded resolution of like import. Thus, six of the eleven ratifying States, together with North Carolina and Rhode Island, the two which refrained from ratification, favored the amendment—a clear majority of the thirteen original States.

In Congress the form of the amendments was changed, and the presence of the word "people" in the two amendments in question has confused the same persons who have had trouble with the preamble.[37]

[35] Mr. Madison, on the floor of the House of Representatives, on June 8, 1789, proposing the amendments, said:

"I find, from looking into the amendments proposed by the state conventions, that several are particularly anxious that it should be declared in the constitution, that the powers not therein delegated, should be reserved to the several states. Perhaps words which may define this more precisely, than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated, I am sure I understand it so, and do therefore propose it." *The Congressional Register,* March 4–June 19, 1789, vol. I, p. 436.

[36] Jonothan Elliot, *Debates in the State Conventions on the adoption of the Federal Constitution as recommended by the General Convention at Philadelphia in 1787,* vol. II (1891), pp. 549 *et seq.*

[37] It is clear without argument, the evidence is at hand, abundant and convincing, in the debates of the day in Congress, that in amendments denying power to the Union of States "the people" meant were not the people of the United States, whose powers were to be limited, but the people of the States, whose powers were reserved anew and safeguarded by formal amendment of the Constitution.

The modification is thus explained by a competent commentator on the Constitution:

"It is evident that Carroll's amendment was intended merely as a renewal of the first part of Tucker's amendment and as a re-expression of the fact that the powers

Let the Supreme Court of the United States, as it is the accredited interpreter of the preamble, articles, and amendments, have the last word on the States of the American Union and the United States:

PEOPLE.

No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States.

Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheaton, 316, 403, decided in 1819.

PREAMBLE.

Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted.

Mr. Justice Harlan in *Jacobson* v. *Massachusetts*, 197 United States, 11, 22, decided in 1905.

reserved were derived in each State from the people of the State." Charles Warren, *The Supreme Court and Sovereign States* (1924), p. 112.

Under date of August 18th, the following colloquies took place in the House of Representatives:

"Mr. TUCKER [South Carolina] Proposed to amend the proposition by prefixing to it, 'all powers being derived from the people,' . . . He extended his motion also, to add the word 'expressly' so as to read 'The powers not expressly delegated by this constitution.'

"Mr. MADISON [Virginia] Objected to this amendment, because it was impossible to confine a government to the exercise of express powers, there must necessarily be admitted powers by implication, unless the constitution descended to recount every minutiae. . . .

"Mr. CARROLL [Maryland] proposed to add to the end of the proposition, 'or to the people,' this was agreed to."

Under date of August 21st,

"Mr. SHERMAN [Connecticut] Moved to alter the last clause so as to make it read, the powers not delegated to the United States, by the constitution, nor prohibited by it to the states, are reserved to the people." *The Congressional Register*, June 22–Sept. 29, 1789, vol. II, pp. 234–235, 244.

The official title of this publication of 1789 is of interest, as showing the way in which the people of that day looked upon the United States and the States composing it. It is therefore given: *The Congressional Register; or, History of the Proceedings and Debates of the First House of Representatives of the United States of America. Namely, New-Hampshire, Massachusetts, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, South-Carolina, and Georgia. Being the Eleven States that have Ratified the Constitution of the Government of the United States.*

SOVEREIGNTY OF STATES IN THEIR UNITED AND INDIVIDUAL CAPACITIES.

On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognised by one of the articles in amendment of the constitution, which declares, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the *states* respectively, or *to the people*."

The government, then, of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication.

Mr. Justice Story in *Martin* v. *Hunter*, 1 Wheaton, 304, 325-326, decided in 1816.

In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.

Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheaton, 316, 410, decided in 1819.

Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Chief Justice Chase in *Texas* v. *White*, 7 Wallace, 700, 725, decided in 1868.

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States.

Mr. Justice Nelson in *Collector* v. *Day*, 11 Wallace, 113, 124, decided in 1870.

Rôle of the Supreme Court.

We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preëminently of this—a duty oftentimes of great delicacy and difficulty.

Mr. Justice Brewer in *South Carolina* v. *United States*, 199 United States, 437, 448, decided in 1905.

The result of it all can be stated in a few words from President Monroe's message to Congress of 1822:

There were two separate and independent governments established over our Union, one for local purposes over each State by the people of the State, the other for national purposes over all the States by the people of the United States. The whole power of the people, on the representative principle, is divided between them. The State governments are independent of each other, and to the extent of their powers are complete sovereignties. The National Government begins where the State governments terminate, . . . This Government is also, according to the extent of its powers, a complete sovereignty.[38]

This is, I conceive, the true state of affairs; and the greatest contribution of America to the cause of international peace is, in my opinion, this "indestructible Union composed of indestructible States," originally thirteen,

[38] Views on the subject of internal improvements; paper accompanying message of May 4, 1822, vetoing the Cumberland Road Bill. *Writings of Monroe*, vol. VI, p. 223; *Messages of the Presidents*, vol. II, p. 148.

For the process by which the thirteen original States united under the Articles of Confederation, and later under the Constitution, see, Henry B. Dawson, *The Motley Letter*, July 5, 1861. *The Historical Magazine*, vol. ix, second series, No. III, March, 1871, pp. 157–201.

For the States in their individual capacities, and the United States—the States in their united capacities—see, James Madison to Robert Y. Hayne, United States Senator from South Carolina. Gaillard Hunt, *The Writings of James Madison*, vol. IX (1910), pp. 383–394 note.

now forty-eight in number, organized to establish justice, and in which "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence."[39] The arbitration of disputes between the thirteen States by temporary courts or commissions was an important feature of the loose Union under the Articles of Confederation. The decision of controversies between the States and between a State and the United States according to principles of justice expressed in rules of law, is the very heart of the more perfect Union under the Constitution of these United States of America.

In the Convention of Virginia called for the ratification of the Constitution, Madison appeared in behalf of that instrument and, in the course of his remarks, made some observations which were then timely, and which have not yet lost their point. "Nothing," he said, "has excited more admiration in the world, than the manner in which free governments have been established in America. For it was the first instance from the creation of the world to the American Revolution, that free inhabitants have been seen deliberating on a form of government, and selecting such of their citizens as possessed their confidence, to determine upon, and give effect to it." "If it has excited so much wonder," he continued, "that the United States have in the middle of war and confusion, formed free systems of government, how much more astonishment and admiration will be excited, should they be able, peaceably, freely and satisfactorily, to establish one general government, when there is such a diversity of opinions and interests, when not cemented or stimulated by any common danger!" It touches our pride to hear that ours is the first experiment; it raises our admiration to learn from a participant the difficulties—difficulties which Madison says were "not

[39] Chief Justice Chase in *Lane County* v. *Oregon*, 7 Wallace, 71, 76 (1868).

to be described in its formation." But then, as now, the ways to agreement were "mutual deference and concession."[40] What the American States have done, the nations of Europe can do: they have frequently united to wage war; they may one day think of uniting to live in peace. If so, the Constitution for the United States of America may ease the way to a Constitution for the United States of Europe.[41]

[40] Session of June 24, 1778. *Debates and other Proceedings of the Convention of Virginia, Convened at Richmond, on Monday the 2nd day of June, 1788, for the purpose of deliberating on the Constitution recommended by the Grand Federal Convention,* Richmond (2d ed., 1805), p. 440.

Elliott's *Debates,* vol. III, p. 616.

[41] The framers of the Constitution may have had Europe in mind when they formed the perfect union of the Constitution—at least two have put themselves on record to that effect, and they were not its most inconspicuous members.

The venerable Benjamin Franklin, then President of the State of Pennsylvania, writing to M. Grand, in Europe, said under date of October 22, 1787:

"I send you enclos'd the propos'd new Federal Constitution for these States. I was engag'd 4 Months of the last Summer in the Convention that form'd it. It is now sent by Congress to the several States for their Confirmation. If it succeeds, I do not see why you might not in Europe carry the Project of good Henry the 4th into Execution, by forming a Federal Union and One Grand Republick of all its different States & Kingdoms; by means of a like Convention; for we had many interests to reconcile."

Documentary History of the Constitution of the United States of America, vol. IV (1905), pp. 341–342.

James Wilson, likewise of Pennsylvania, said on December 11, 1787, on the floor of his State Convention, called to ratify the Constitution:

"And now is accomplished what the great mind of Henry IV of France had in contemplation—a system of government for large and respectable dominions, united and bound together, in peace, under a superintending head, by which all their differences may be accommodated, without the destruction of the human race."

Elliot's *Debates in the several State Conventions on the Adoption of the Federal Convention,* vol. II (1891), p. 528.

III

STEPS TOWARD ARBITRAL AND JUDICIAL SETTLEMENT

Dr. Johnson informs us that "war and peace divide the business of the world"; and there is a belief voiced at times that the division is unequal and inequitable. We have all seen calculations showing how many years the world has been at war—not all the world, but the various nations which, taken together, compose it. Where foreign wars have fallen short, the pessimists among us have eked out their dismal tale with civil wars, rebellions, and mere uprisings, in order to show that man is a fighting animal, and that there is no way of ridding him of the fighting instinct.

I admit that wars have been more frequent than they should have been. But in how many cases has the resort been made to arms through ignorance, and through mere blundering, without seeking to cultivate the fighting instinct lest by lack of use it should dry up and atrophy?

Reflecting people, however, are not to be led astray by this sort of statement, and to despair of the future because of the mistakes and mishaps of the past. Rather, they will seek with renewed energy for a way out. And they will not need to go far to find it. For did not Secretary of State Hughes say, on opening the Conference on the Limitation of Armament in Washington in 1921, that the way to peace is the will to peace? And the homely maxim will come to their aid, if they are in the right frame of mind, that "where there's a will, there's a way."

We are apparently so made as to be attracted by the strange, the picturesque, the heroic. There is nothing

strange in peace—it is the normal state of things. We think little or nothing about it when we have it, or how it may be preserved. Our minds are on the next war. And the way to have a next war is to keep thinking about it. Things do not always come by thinking about them, but that is one way of bringing them into being. The Scripture has something about the young man who stayed at home and attended to business. He did not seem to make the same impression upon his parents as the youngest, who strayed away into devious paths, and, having spent his portion in dissipation, bethought him of his home and his family when he had come to the end of his means. There was nothing heroic in staying at home and doing one's duty. The prodigal cut a dash in the world, attracted attention, and was apparently picturesque, if not heroic.

We hear much of the failures of diplomacy and the shortcomings of diplomats; so much, indeed, that many people think of diplomacy as synonymous with failure, and would be astonished to learn that there are diplomatists too numerous to mention, who are honest and without shortcomings, and at least as reputable as their critics. Much of the world's business is done by diplomats. The disputes arising between countries which they settle are legion. But of the ninety and nine which they settle, we hear nothing; of the one failure, everything. One would almost be led to believe that the failure was the thing after all! Not a few who criticize the professional diplomat are inclined to take a malicious joy in the breakdown, and certainly they take more interest in the failure than they do in the ninety and nine cases satisfactorily settled.

But there are few among us to-day, I venture to believe, who would subscribe to the statement that "war is a part of God's cosmic system," that it is the source of "man's noblest virtues," and that "without war the world would sink into materialism." Some there are, indeed, who would

maintain that "eternal peace is a dream," but few that it is "not even a beautiful dream." Yet all of these statements are contained in a letter by the high-minded and upright von Moltke, written as late as 1880.[1] Many would think, if the authorship were not disclosed, and the year were hidden, that these views dated from the Stone Age. To convince ourselves that what has been need not always be, we need only compare the man of the Stone Age with the man of to-day. The king, where he still exists, no longer goes to war as he went a-hunting; and war itself, while it is always a possibility for which wise men must prepare until nations are agreed upon a better method of settling their quarrels, does not fill so large a space as formerly. We only read of a Hundred Years War, of a Thirty Years War, and even of a Seven Years War. The World War, which many people are inclined to call the Great War, and the greatest which has tormented humanity, lasted only a little over four years — only a few months longer than our Civil War. The truth of the matter is, the writers of history see too often nothing but wars, and recount nothing but wars. We are, as it were, born into an atmosphere of wars, even if we first see light in the piping days of peace.

Why not go to court, as men and women in all of these civilized but warring nations do? Or, if they do not, they are brought to court by those having a grievance against them. The answer is, that it has taken centuries to get men and women before courts of justice, and that between nations progress toward any goal appears to be the result of many steps, rather than of a sudden leap. But "step by step the ladder is ascended," and of some of these steps it is my purpose to speak in the present lecture.

Mr. Justice Baldwin, a very learned judge of the

[1] *Schriften und Denwürdigkeiten des General-Feldmarschalls Grafen Helmuth von Moltke* (Berlin, 1892), 8 vols. in 7, vol. V, pp. 193–197.

Supreme Court of these United States, and as sound as learned, has thrown a flood of light on the process by which political questions become judicial disputes; and, although these matters will later engage our attention, I should like to begin the present phase of the subject with a line or two from Judge Baldwin's opinion in the case of Rhode Island against Massachusetts[2] to the effect "that all controversies between nations, are, in this sense, political, and not judicial, as none but the sovereign can settle them." We have here a point of departure from which we are to proceed to judicial settlement. "None can be settled," he goes on to say, "without war or treaty, which is by political power." But the States of the American Union agreed to submit their controversies to "a court constituted by themselves, as their own substitutes, authorized to do that for states, which states alone could do before." The question, political because settled directly by the States in controversy, becomes judicial through the renunciation of direct settlement in favor of settlement by an agency of their own creation and of their own choice. The essence of the transaction is that the States give up the right of settling their affairs by themselves; and every renunciation of that right is a step away from political settlement and towards culmination in the judge's opinion in judicial decision through, I venture to add, many little steps from the old way of things to the new. In simplest terms, the process is away from the States themselves to third parties or agencies of the parties, to do for the States indirectly what the States can not do directly for themselves. Nature, they say, never takes a leap, and nations are proverbially unwilling to take a leap in the dark. They proceed from the known to the unknown by an infinite series — we may almost say — of infinitesimal steps until the State finds itself at the end of the flight leading to the tribunal of

[2] *Rhode Island* v. *Massachusetts*, 12 Peters, 657, 737 (1838).

arbitration or the temple of justice, to revert to the figure of speech of a previous lecture, or at the top of the ladder, if we prefer the homelier expression. It is a progress onward and upward and an ascent in either case from political adjustment to judicial decision, which is at present the goal which the enlightened have before their eyes and which the world is rapidly approaching.

Let us take a survey of these different steps, each of which may seem distinct, but each of which is, nevertheless, a step toward judicial settlement between nations—the essence of which is the appearance of independent States before a court of justice. For our purposes, it is better to analyze the steps, to show their relation, and how they tend toward a goal which was not necessarily before the eyes of those who took them, rather than to attempt to consider the historical appearance of each. We are, at least for present purposes, at the end of a development, and we may look backward and survey the field of progress.

Let us begin with diplomacy, and define the sense in which it is understood and used in these lectures. Since States, as artificial persons, are not able to communicate directly, but require an agent—a natural agent—to transmit the collective will of one State to another, it follows necessarily that the relations between States were conducted from the first by agents who were in fact diplomats, if not in form or by profession. They were appointed for special purposes, because it is only in a highly organized international community that the need is felt, or was felt, for permanent representatives in the capitals or chief cities of the other nations. We read of legates, we read of ambassadors, in the days when the world was young—or at least in the early days of recorded history. They were appointed for special purposes; and, when the object for which they had been selected was

attained, or, unfortunately, when it had failed, they returned to their respective countries. They were looked upon as a class set apart; they were treated with reverence as the outward and visible agents of the States which they represented. Their persons were inviolable; it was a crime to mistreat them even in the slightest degree and the greatest of crimes to put them to death.

There is a charming French comedy by Racine — the only comedy which that facile genius produced—and, it may be said, the only comedy which interested the great Napoleon, whose vein was the tragic and heroic. It is entitled *Les Plaideurs*, which may be "Englished" as "*The Litigants.*" In it, the extemporized counsel opens his argument with "Before the creation of the world—," whereupon the judge, gasping and overcome, interrupts him with the request to "Pass on to the Deluge." Let us take this advice in the spirit, if not to the letter, and content ourselves with a general statement that, in the late Middle Ages, it became the custom of the States, conscious of their importance and of their interests, to send ambassadors as a matter of course; and that, during the Sixteenth Century, the system of permanent embassies and legations came into being. There was here an agency to represent, in foreign capitals, the views of the home government; to convey them to the sovereign of the country to whom they were accredited, and by an exchange of views and by compromise—if good will were only present—to smooth out difficulties and maintain the relations of peace. If the ambassadors failed, it was due, doubtless, to the fact that their home countries did not supply them with the instructions which they needed, and did not direct them to sacrifice pride and position, in order to reach a friendly settlement—for ambassadors and ministers are agents of the State, and, like the military, they act under instructions. The trouble was the mediæval conception of the

monarch, who, as sovereign, decided questions as the lord of a manor would direct his domestics and run his estate. The new order of things has changed this at the source; the monarch, where he exists, is, in the language of Frederick the Great, the first servant of his people; he is no longer their master. The Department of State or the Ministry of Foreign Affairs is subject to the direction and control of the national law—and the monarch is only its agent. And the diplomatic agents of the present day are persons trained in negotiation, acting under instructions. If their instructions be permeated with justice, peace will prevail; if not, who may predict what will happen? One thing is certain: that the acceptance of the principle of the division of labor means that persons should be chosen who, as the result of experience in their calling, are competent to discharge the duties of their position, reserving, of course, to the governments, the right to appoint special ambassadors or special agents for special purposes.

This is, of course, a happy and ultimate goal. It would change international relations; it would bring in a new order of things. Will it materialize? Diplomatic agents act, as has been said, upon instructions. Their instructions are based upon the usages and customs of international life; usages and customs which are the sources of, and indeed are, international law. Therefore, in addition to representing their respective countries, diplomatic agents have, under instructions from their governments, coöperated in the making of this law of nations upon which many of us think the peace of the world depends. In the negotiations leading to these various steps which I am about to lay before you, the diplomats represent their governments, which submit to this newer form of settlement the controversy which they themselves have failed to adjust.

The first is good offices—a remedy which presupposes that the two countries in dispute have either failed to reach

a settlement, or that the prospects point to a failure, not to success. In such a case, a government which is indifferent to the controversy, in the sense that it is not a party to it, but interested in its peaceful termination, offers, or is requested by one or other of the parties or even by another third party, to lend its good offices to the countries in dispute that they should adjust their differences, indicating, although not pressing upon them, a way out of the difficulty. It is a word of advice—it is a suggestion. It may be nothing more.

Without further definition, our own experience will make clear the importance of this simple remedy. A hasty word, an ill-considered act, a lack of courtesy it may be, has caused two friends to fall out. They are no longer on speaking terms, and they avoid each other. A third person takes occasion to suggest that they should make up their differences, indeed, brings them together. The result we know. It does not need to be depicted. Nations are often willing to act in the same way, if only the word is spoken. Instances of this are so many that it would be an endless task to enumerate them. It would also be difficult to find apt illustrations, inasmuch as these things, happening every day, are so common that they escape public attention.

Let us take a definition and a couple of examples. The definition was drawn up by the representatives of twenty-six Powers meeting in conference in the summer of 1899. According to the Pacific Settlement Convention of this First Peace Conference of The Hague,[3] "Good offices and mediation undertaken either at the request of the parties in dispute or on the initiative of Powers strangers to the dispute have exclusively the character of advice, and never have binding force." Good offices or mediation may be extended "even during the course of hostilities"; and "the exercise of this right can never be regarded by either of the

[3] For the text of this Convention, see Appendix II, No. 4, pp. 273–275.

parties in dispute as an unfriendly act." To render either remedy effective, the twenty-six Powers agreed to have recourse to the good offices or mediation of one or more friendly Powers "in case of serious disagreement or dispute, before an appeal to arms." There is a limitation of the obligation, inasmuch as the resort is binding only "as far as circumstances allow." With good will there is no limitation; without good will there is no resort, and the proffer of good offices or mediation is rejected. The words of limitation are only words of caution as nations act slowly and with circumspection. But they act and are more likely to do so if they have the feeling that their hands are not tied and that any step which they may take is upon their own initiative. In the Second Peace Conference of 1907, forty-four nations confirmed the action of its predecessor of 1899, so that we are here in the presence of what can very well be called a general agreement from direct settlement to that of third parties.

Of the many examples which might be cited, two must suffice: one is old and rather militant; the other recent and highly pacific. On May 16, 1703, a treaty was signed at Lisbon between Great Britain and Portugal. The third article deals with good offices in this way:

> If ever it shall happen that the Kings of Spain and France, either the present or the future, both of them together, or either of them separately, shall make war, or give occasion to suspect that they intend to make war, upon the kingdom of Portugal, either on the continent of Europe or in its Dominions beyond Seas, Her Majesty the Queen of Great Britain, and the Lords the States-General, shall use their friendly offices with the said Kings, or either of them, in order to persuade them to observe the terms of peace towards Portugal, and not to make war upon it.[4]

The recent case is but of yesterday, and has an interest for us Americans of the North, as it is none other than the

[4] *British and Foreign State Papers*, XIII, p. 1124; Sir Ernest Satow, *A Guide to Diplomatic Practice*, vol. II (second edition, 1922), p. 329.

good offices—the word of advice—of President Roosevelt to Japan and Russia at war in 1905, that they should exchange views by their representatives, and the offer for this purpose of Portsmouth in the State of New Hampshire, as the place where negotiations might take place, if this were agreeable to them. The result was the Peace of Portsmouth between these two great countries, signed in that city on the 5th day of September, 1905, ending the struggle of giants in the Far East in the course of 1904–5. The proffer was not "meddling" upon the part of President Roosevelt; it was made at the request of Japan. The armies of the Island Empire had steadily pushed the Russians back; but, with each defeat, they concentrated and their resistance became stiffer. There was apparently a feeling in Japan to let well enough alone, and to take advantage of victory before Russian reinforcements from Europe should arrive and stop the advance of the Japanese, if not indeed turn Russian defeat into victory. The proffer appears to have been made to Russia in November, 1904; for, under date of November 17th, Secretary Hay received a cable from St. Petersburg to the effect that the Czar was anxious to accept President Roosevelt's proposal, but that he was prevented by conditions then existing. The acceptance of the proffer required further defeat and bloodshed "to bring Russia to terms."[5] A few further entries in Mr. Thayer's *Life and Letters of John Hay* tell the story.

> The air is still full of rumours of peace by our intervention. (January 3, 1905);
>
> Sternburg [German Ambassador at Washington] says the British Ambassador in Petersburg has pointed out to Count Lamsdorff [Russian Minister for Foreign Affairs] the advantages for Russia of a speedy conclusion of peace. The Ambassador stated that Lamsdorff seemed to agree with him. Benckendorff [Russian Ambassador in London] has

[5] W. R. Thayer, *Life and Letters of John Hay* (1915), vol. II, pp. 384, 390.

had similar interview with Lansdowne [British Secretary of State for Foreign Affairs] (February 13th);

The President keeps warning Japan not to be exorbitant in her terms of peace (February 15th). [5A]

Secretary Hay's health was failing; and, after a holiday in Europe, on his return to Washington, June 15th, he learned, according to his biographer, "that President Roosevelt was on the point of bringing about peace negotiations between Russia and Japan."[6] The destruction of the Russian fleet under the command of the unfortunate and ill-starred Admiral Rojdestvensky in the Sea of Japan in May, had brought Russia to terms. As appears from the last of the entries from Secretary Hay's diary, under date of June 19, 1905:

The President gave me an interesting account of the peace negotiations—which he undertook at the suggestion of Japan. He was struck with the vacillation and weakness of purpose shown by Russia; and was not well pleased that Japan refused to go to the Hague.

Here it is to be observed that President Roosevelt's proffer was at the request of Japan; and it is characteristic of good offices that the offer may be made at the request of one of the two parties at outs, whereas in mediation, which often springs out of or is indeed a continuation of good offices, the request is from both. This is naturally so in mediation, requiring, as the name indicates, an action by the mediator against both of the parties, and in their common interest. In the proffer and acceptance of good offices, nothing is decided; neither party appears as a suitor or litigant before the third Power, or before any

[5A] Since the delivery of this lecture, and indeed since the volume was sent to the printer, a very important work by Mr. Tyler Dennett, based upon official documents, has been published, entitled *Roosevelt and the Russo-Japanese War—A Critical Study of American policy in Eastern Asia in 1902–5, based primarily upon the private papers of Theodore Roosevelt* (1925). Chapter VIII (pp. 170–188) deals with "Peace Overtures"; chapter IX (pp. 189–214) with "Good Offices"; and Appendices A–L (pp. 215–235) give the material portions of the official correspondence.

[6] Thayer, *Life and Letters of John Hay*, p. 406.

tribunal or court. We are, however, in the presence of a method which, if accepted, may lead to mediation—the next step—and to any of the rounds in the ladder leading to arbitration or judicial settlement; or good offices, if promptly accepted and in a conciliatory spirit, may prevent a suit, even if the tribunal and court be in existence.

Let us now take up mediation, the second round in the ladder, which carries the process of settlement a step farther. It is sometimes confused with good offices, and not unnaturally, because the word of advice may lead to a suggestion of the basis of settlement, and to an invitation to act as a mediator between the two parties. There is, however, a difference between the two, and because of this difference, a Power may be willing to accept good offices but be unwilling even to consider mediation.

Thus, in 1770, Catherine the Great of Russia accepted the proffer of good offices of Austria, and of the great Frederick of Prussia, but rejected even the mention of mediation between Russia and Turkey. "The word and the form of mediation must be avoided," she wrote to Frederick. "I am ready to accept the good offices of the Court of Vienna. I claim those of Your Majesty." When the hour of negotiation should come, the Czarina intended to treat directly with the Turks, not through an intermediary.[7]

Foreseeing the war of 1870 between France and Prussia, the Government of Great Britain was genuinely anxious to prevent what proved to be a disaster for France and scattered the seeds of destruction which ripened into the catastrophy of 1914. Two days before the fatal 19th of July, on which war was declared, the Duke of Gramont, then Minister of Foreign Affairs, wrote to the French

[7] Satow, vol. II, p. 342 (translated). For good offices in general see the excellent chapter in Sir Ernest Satow's *Guide to Diplomatic Practice* (second edition, 1922), vol. II, pp. 326–343. The incidents in the present lecture are for the most part taken from this admirable work.

Ambassador in London that Mr. Gladstone's Government had offered its services as mediator, but "whatever might be our disposition at this moment to accept the good offices of a friendly Power, especially England, we could not now to-day accept the offer of the Cabinet of London."[8] Under date of August 17th, Lord Granville, the British Secretary of Foreign Affairs, stated that "Her Majesty's Government have certainly no intention or desire to obtrude their mediation either on France or on Prussia; but . . . if at any time recourse should be had to their good offices, they will be freely given, and zealously exerted for the restoration of peace between Her Majesty's allies."[9] Later, France formally declared that it neither needed nor wished "the good offices of others";[10] but still later, when France lay prostrate before the victorious Prussians, Jules Favre, Minister of Foreign Affairs in the Provisional Republic which had replaced the shattered government of the Empire, made use of the good offices of Great Britain in arranging an interview with Bismarck.

In the technical sense of the word, the duty of the Power employing good offices ends with a word of suggestion. The rôle of the mediator, however, is different and more exacting, as it suggests a way out of the difficulty. It is, however, a word of advice in the sense that it is a suggestion that the Powers should or might take a certain course of action in order to settle their differences. It may be a mere suggestion; a vague and tentative plan may be proposed, or something more detailed, which, if accepted, would end the controversy. The important point for our purpose is that the mediator does not decide; he often, however, lays before the parties a basis of decision.[11]

[8] *British and Foreign State Papers*, vol. LX, p. 883 (translation).

[9] *Ibid.*, vol. LXI, p. 683.

[10] *Ibid.*, vol. LXI, p. 713.

[11] On mediation, see the elaborate discussion in Satow's *Diplomatic Practice*, vol. II, pp. 344–395.

As may be supposed, instances of this modest but efficacious method of adjustment are many; and, of the many, only two may be mentioned: one in which France appeared as mediator between Great Britain and the Kingdom of the Two Sicilies, in the matter of the Sulphur Monopoly; the other, and by far the more interesting, in which Leo XIII straightened out the difficulties between Germany and Spain in the affair of the Carolines.

The facts of the Sulphur Monopoly were simple, and in the teeth of an existing treaty of Great Britain with Naples, and also, for that matter, in violation of a treaty between Naples and France. In 1836, one Taix, a French subject, obtained the sole right of purchasing at a fixed price, and the exclusive right of exporting, all the sulphur produced in Sicily for a period of ten years. After considerable delay and much heat, a French offer of mediation was accepted by Great Britain and Sicily. At the time, Adolphe Thiers was Minister of Foreign Affairs of France, and his note of July 4, 1840, to Lord Granville, then British Ambassador to Paris, may well serve as a model of its kind, stating, without additional explanation or comment, the advance of mediation over good offices in effecting a settlement:

> The Government of the King, my august sovereign, justly attentive to the interests of general peace and animated by the most friendly sentiments for the two Courts which are united to him by close ties, has thought it a duty to offer his mediation, with a view to facilitate a solution of the difference which has arisen between the cabinets of London and Naples with regard to the exploitation of sulphur in Sicily.
>
> This mediation has been accepted. This evidence of confidence which, on the part of a State so powerful as Great Britain, shows an honorable desire to seek through means of conciliation rather than by an appeal to force the satisfaction to which it deems it is entitled, has deeply touched the heart of the King. The Government of His Majesty, in its eagerness to discharge the high mission thus confided to it, has examined with the most scrupulous attention all the elements of the question. It has endeavored to weigh with equitable impartiality

the respective claims and rights, and this conscientious examination has suggested to it the proposals which I am about to state to your Excellency as the most proper, in our view, to lead to a settlement truly acceptable for both parties.

The contract, entered into July 9, 1838, between the Neapolitan Government and the Taix Company for operating sulphur mines in Sicily would be cancelled. . . .

His Sicilian Majesty, animated by a sentiment of equity and friendship, would consent to hear the claims of those English subjects who claim to have suffered losses as consequence of the privilege granted in 1838 to the Taix Company. A liquidating commission would be immediately constituted for this purpose. It would sit at Naples, and would be composed of two English commissioners, two Neapolitan commissioners, and an umpire, appointed in advance by the French Government with the agreement of the two interested courts, in order to give the casting vote when necessary.

This Commission could receive only requests for indemnity formulated by English subjects in the following categories: . . .

After the creation of the liquidating commission a period of three months would be granted claimants to produce the papers supporting their requests for indemnity; a second period of six months would be assigned for the conclusion of its labors, and such indemnities as it might recognize to be just would be paid within the year following the day of its dissolution.

Such, Mr. Ambassador, are the proposals which the Government of the King thinks it should present simultaneously to the two Powers which have accepted his mediation. I have the conviction that they will appear to you to rest on satisfactory foundations, and I await with confidence the assent that you will doubtless consider yourself in a position to give to them.[12]

The case of the Carolines is very famous, and shows that the rôle of the Papacy in the settlement of disputes is not ended, if it be desired, as it was frequently and to good effect in times past. Germany and Spain were in dispute as to the ownership of the Caroline Islands of the Pacific. For centuries these islands had been under the sovereignty of Spain; but Germany, alleging that Spain had withdrawn its claim, as it were, to the islands, and had left

[12] Satow, *Diplomatic Practice*, vol. II, pp. 366–368 (translation).

them unoccupied and without a master, took possession of the island of Yap in 1885. The news of this action caused commotion in Spain. The German Consulate in Madrid was surrounded, and the German escutcheon and flagstaff were pulled down and burnt amid cries of "Death to Germany."[13] A rupture of friendly relations was imminent, had the governments not bethought themselves of His Holiness Leo XIII. He gladly complied with their request to mediate between them, and in 1885 proposed a method of adjustment which, accepted by both and incorporated in a treaty, ended the difficulty. Good will was present, with its necessary consequence—a happy result. In view of the importance of the incident and the interest attached to it because of the intervention of the Pope, I quote an extract here and there from the "proposition" of his Holiness under date of October 22, 1885:[14]

> The discovery made by Spain in the sixteenth century of the Caroline and Pelew islands, which form part of the archipelago, and a series of acts accomplished at different periods by the Spanish Government in those same islands for the good of the natives, have, in the conviction of that government and of that nation, created a title to the sovereignty founded on the maxims of international law invoked and followed at that period in the case of analogous disputes. . . .

Ten years before the incident, Germany and Great Britain had informed Spain that they did not recognize its sovereignty over the Caroline and Pelew Islands. Insisting that the claim of sovereignty is rendered effective only by occupation, and that Spain had not occupied the Islands, Germany took possession of the Island of Yap in the Caroline archipelago. His Holiness found that Germany had acted on this theory of law, and in entire good faith. In consequence, he proposed a convention between Germany and Spain:

[13] John Bassett Moore, *International Law Digest*, vol. VI (1906), p. 864.
[14] John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. V (1898), pp. 5043–5046.

1. To confirm the sovereignty of Spain over the Caroline and Pelew Islands.

2. The Spanish Government to render her sovereignty effective engages to establish as quickly as possible in that archipelago a regular administration with sufficient force to guarantee order and the rights acquired.

3. Spain offers to Germany full and entire liberty of commerce and navigation, and of fishing at the same islands, as also the right of establishing a naval station and a coal depot.

4. The liberty of making plantations in those islands, and of founding agricultural establishments on the same footing as Spanish subjects, to be also guaranteed to Germany.

The two Governments in dispute adopted the proposition, expanding and incorporating it in a protocol under date of December 17, 1885.[15]

In these examples, we have a war ended by a word of advice from the President of the United States, and two difficult situations adjusted without a resort to force—one through the mediation of France, the other through the reference to the Roman Pontiff and his suggestion of a method satisfactory to each. In two of these cases, it appears that the intervention of the President and of the Pontiff was requested. It is of the essence of these simple methods of adjustment, however, that, without causing affront, a third party may intervene to the extent of good offices and a proposal of mediation, as in the case of France in the sulphur dispute.

A further step in the upward direction is that of the Commission of Inquiry. It is of long standing, but it has come into practice again in such a way as to strike the nations as something new. Like good offices and mediation, it has the approval of the Hague Conferences of 1899 and 1907.[16] It is a device for ascertaining the facts in

[15] *Ibid.*

[16] For the text of the Convention for the Pacific Settlement of International Disputes, see Appendix II, No. 4, pp. 275–281.

dispute. It is a method of inquiry, and the persons composing it, be they few or many, form the commission of inquiry. It is not a decision; it is not a proposal of a decision on a point of law to settle the controversy. It may, however, have that result, inasmuch as the ascertainment of facts in dispute often decides a controversy. The remedy is not judicial in the sense that the Commission acts as a court, and yet it certainly does perform the functions of a jury, in that it ascertains, just as the jury, to use the technical expression, finds facts.

When Lord Mansfield was at the bar, he was much in demand as an advocate, because of his skill in laying his client's case before the jury. In fact, his simple statement on opening the case was looked upon as forecasting their finding and as predicting the ultimate decision of the case. This is exactly what is to be expected from the Commission of Inquiry. When the facts are found, they speak for themselves; and, although the principle of law does not become immaterial, nevertheless, a firm foundation is laid for the application of that principle, whatever it may be.

In our day, there was a remarkable instance of a resort to the method of inquiry; and, so clear was it to the parties in dispute that the facts, when found, would decide the matter, that they vested the members of the Commission with the duty of fixing liability. The instance of good offices which I have just laid before you was connected with the war between Russia and Japan and its ending; the instance of the Commission of Inquiry was connected with the conduct of that war.

The Russian Government, in the course of 1904, determined to send a fleet to Japanese waters. Therefore, vessels were got together for the long cruise leading to destruction in the Sea of Japan. Assembling in the Baltic, the fleet passed on its ill-fated mission through that vast body of water, through the Danish Sound, into the North

Sea. From there it would have to continue its course, if nothing happened, through the English Channel, rounding France and Portugal, through the Strait of Gibraltar into the Mediterranean, through the Suez Canal and the Red Sea into the Indian Ocean, and eventually would reach the vessels of its antagonist, patiently lying in wait for the prey. The voyage, however, was interrupted by an incident as strange as it was unexpected. One night, as the vessels were proceeding on their "solitary way," the cry was given from the watch that Japanese torpedo boats were sighted. The Russians opened fire. After some time, when it had stopped, an English fishing fleet was found to have suffered losses: some vessels had been damaged, and some of the crew had been killed and others wounded. To the overwrought, vivid imagination of the officer on watch, with his thoughts on Japan, the fishing fleet off Dogger Bank had seemed to be none other than the Japanese following in the wake of the Russian vessels, and at that moment in their very midst.

The question was one of fact. If Japanese torpedo boats hovered in the vicinity, then the action of Admiral Rojdestvensky, the commander of the Russian fleet, was justified. If, on the contrary, a peaceful fishing fleet was mistaken for enemy craft, then the Russian Admiral was not justified in opening fire, and, as the agent of Russia, his action bound his country. England protested against his action. There were strained moments, and for some days it looked as if the tension might be too great for peaceful settlement. France, however, proposed what was in effect mediation, the ascertainment of facts by a number of naval officers. Great Britain and Russia agreed. They were each to appoint an officer of high rank from their naval service; in addition, France and the United States each were to be asked to appoint an officer of high rank from their naval service, and the four naval officers thus appointed were to

choose the fifth member. They selected an Admiral of the Austro-Hungarian navy. In fact, the entire Commission was composed of Admirals. It is easy to see why the two countries allowed the Commission to fix responsibility as well as facts, because the mere ascertainment of the facts was tantamount to a determination of responsibility; for if Japanese vessels were not present, the action of the Russian Admiral was unlawful, and his country was taxed at one and the same time with the duty of redressing the injury which had been done. The Commission found that Japanese vessels were not present (they were later found to have been in the Sea of Japan) and that therefore Admiral Rojdestvensky had acted without the presence of facts which would have justified his conduct, and his country was liable in damages. These were later agreed upon by direct negotiation between the two governments, damages approximating $300,000 were paid, and the incident was peacefully closed.[17]

It is perhaps of interest to remark in this connection that in the course of 1913–1914, Mr. William Jennings Bryan, then Secretary of State of the United States, negotiated some thirty treaties providing for Commissions of Inquiry, aptly called by him "Treaties for the Advancement of Peace."[18] Of these, twenty-one were ratified; and, although they provided merely for the ascertainment of facts—the duty of the Commissioners being to report the facts as found, and to leave the governments free to take what action, if any, they might care to, upon them—the treaties contained a provision of infinite importance. Each of the contracting parties agreed to allow the Commission a twelvemonth in which to consider the case and to present its report to the governments in dispute; and each of the

[17] See, J. B. Scott, *The Hague Court Reports* (1916), 403–412.

[18] J. B. Scott, *Treaties for the Advancement of Peace between the United States and Other Powers negotiated by the Honorable William J. Bryan* (1920).

contracting parties agreed not to commit any hostile act, much less to go to war, during this period. It is well-nigh impossible to over-estimate the value of these treaties and the principles they incorporate. They are, if I may say so, the greatest advance toward peaceful settlement made by any one man, at any one time, and in any one instrument. The great difficulty in international matters is that the nations, like ordinary people, lose their tempers and strike the first blow before they are sure of the facts.

In view of this, I deem it a duty and a pleasure to lay before you the scheme of the treaties, of which the most advanced is that with our ancient and only ally, France. By the first article, the two Republics bind themselves to submit to a Commission of Inquiry "any disputes" between them "of whatever nature," which diplomacy has failed to settle and which the parties do not refer to arbitration. It is important that all outstanding disputes without exception are to be adjusted by diplomacy, settled by arbitration, or examined by a Commission of Inquiry. More important, however, is the passage immediately following in the treaty, to the effect that "The High Contracting Parties"—I quote literally the official version in English—"agree not to resort, with respect to each other, to any act of force during the investigation to be made by the Commission and before its report is handed in." As the Commission has a year within which to examine the questions referred, this means a twelvemonth of peace, and the period of investigation may be prolonged by mutual consent. The Commission is permanent, consisting of five members, two to be chosen by each party, although but one may be its national, and the fifth, the presiding member of the Commission, to be chosen by common consent.

The third article, of hardly less importance than the first, is, nevertheless, far-reaching and revolutionary. It provides that each party may submit a dispute for investi-

gation. "In the same case," the text reads, "the President [of the Commission] may, after consulting his colleagues and upon receiving the consent of a majority of the members of the Commission, offer the services of the latter to each of the Contracting Parties." What happens then? Let the text answer. "Acceptance of that offer declared by one of the two Governments shall be sufficient to give jurisdiction of the case to the Commission. . . ."

The fourth article has two provisions of importance. By the first, each party may state to the President "the subject-matter of the controversy," but the Commission is to go on with its investigation notwithstanding any difference in the statements made by the parties. The second provision opens up a vista of usefulness of daily occurrence in municipal procedure, but hitherto a stranger in the international world. Its exact text is therefore quoted:

> In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Commission shall as soon as possible indicate what measures to preserve the rights of each party ought in its opinion to be taken provisionally and pending the delivery of its report.

We are here face to face with the preliminary injunction of municipal law, which, crossing the national frontier, thrusts itself into the Law of Nations. May it ever remain embedded in their practice.

What is to become of the report of the Commission? Adopted by a majority and signed by the President by virtue of his office, whether he agrees with it or not, it is transmitted by him to each of the parties, which reserve full liberty as to the action to be taken on the report of the Commission.

It is a great step forward, and the future is likely to hold Secretary Bryan in grateful remembrance for many a year to come.

With the Commission of Inquiry, we are approaching

judicial settlement in the sense that one function of the jury is performed by the Commission. We are closer to judicial settlement with the next step—that of friendly composition. Indeed, the settlement may be judicial, or it may not be. The fact is that the nations have agreed to submit their difference to the decision of a person possessing their confidence, binding themselves to accept his settlement because of the confidence which they have in his rectitude. If the matter is thus left to him, he is free to find the facts and to decide the case by a principle of law. He is free, on the other hand, to examine the facts and to decide it to be in the interest of both parties to "split the difference," as we often say. The desire of the nations resorting to this form of settlement is to get the difference out of the way, rather than to have it settled according to any particular manner. Its presence is a source of irritation; its adjustment makes for friendly relations. But having assumed a position, neither nation is willing, or, it may be, neither is able, to back down; hence, the friendly compositor is sought. He makes his appearance; he adjusts the controversy. Each party accepts his solution, although neither would have been willing to propose it, or to have accepted it had it come from the other.

In our day, this remedy has been tried and not found wanting by Chile and the United States, in the so-called Alsop Case. The facts were complicated; the principles of law invoked were debated; and neither country, apparently, was able to propose a solution that was agreeable to the other.

In the '70's money was advanced to Bolivia by one Gama, a citizen of Brazil, in connection with the exploitation of guano and the working of mines. He was financed by the house of Alsop established in Chile, the members of which were American citizens. He failed, and in 1875 assigned to the Alsop company his interest in the conces-

sions and his claims against Bolivia. The Alsop firm likewise failed, and its liquidator, in the year following, entered into a contract with Bolivia by which the amount of that State's liability to the firm was fixed at 835,000 bolivianos bearing interest at five per cent, and two funds were provided as a source from which the debt should be extinguished: one, a portion of Bolivia's share in the duties of the customhouse situated at the port of Arica, in the territory of Peru, through which imports to Bolivia entered that country; the other, permission to work the silver mines in Bolivian territory adjoining the coast. Unfortunately, war broke out in 1879 between Peru and Bolivia on the one hand, and Chile on the other. The territory in which the customhouse was situated passed from Bolivia to Chile, and the coast of Bolivia where the mines were situated likewise passed to Chile as victor in the war. For our purposes, it is sufficient to say that Bolivia and the United States maintained the liability of Chile to assume and to pay the indebtedness, on the ground that it had succeeded to the territory from which the payment was to be made to the firm of Alsop, the members of which were Americans. Chile rejected the American and Bolivian contention; but, in the treaty with Bolivia, October 20, 1904, admitted to a limited extent, liability for certain claims against that unfortunate country, including that of Messrs. Alsop and Company, and set aside a certain amount from which they should be paid. The amount was insufficient to pay them in full. The following day, Chile entered into a secret agreement with Bolivia by which it engaged to assume the full liability of the specified claims against Bolivia. The purpose of Chile was clearly to force Bolivia's creditors to compromise their claims if that were possible, and in any event to free Bolivia from the indebtedness which it had expressly assumed. The consideration of the treaty was the recognition by Bolivia of title to the Bo-

livian territory which Chile had acquired by conquest. The question therefore was whether Chile could force an American creditor of Bolivia to accept less than the full amount of the claim which Chile had acknowledged and promised to settle in a public treaty, and for the payment of which Chile, in a secret agreement with Bolivia, had promised to relieve that country.

Unable to agree on the claim after twenty-five years of desultory, fitful, and at times acrimonious negotiation, Chile and the United States agreed in 1909 to submit the tangle to Edward VII, to be settled by him as "amiable compositeur"—the friendly compositor of English—and, upon his death, to George V, who rendered his ruling in 1911. As it is the nature and the form of the agreement which matters, I quote the preamble and the first paragraph of the protocol of submission:

> Whereas the Government of the United States of America and the Government of the Republic of Chile have not been able to agree as to the amount equitably due the claimants in the Alsop claim;
>
> Therefore, the two Governments have resolved to submit the whole controversy to His Britannic Majesty Edward VII, who as an "amiable compositeur" shall determine what amount, if any, is, under all the facts and circumstances of the case, and taking into consideration all documents, evidence, correspondence, allegations, and arguments which may be presented by either Government, equitably due said claimants.[19]

A reference in form to a monarch or president is a reference in fact to a committee appointed by him to consider and report the award or decision which he should render. The committee in the present case found it necessary to determine at the outset the rôle of the friendly compositor. "The duty . . . ," to quote from the opening lines of the report, "is one of pronouncing an award which shall do substantial justice between the Parties without attaching

[19] *Foreign Relations of the United States*, 1911, pp. 38–53; *American Journal of International Law*, vol. V (1911), pp. 1079–1107.

too great an importance to the technical points which may be raised on either side. This is what we conceive to be the function of an 'amiable compositeur.'" And, in a later passage, the report defines the duty in terms of practice, "Your Majesty is acting as 'amiable compositeur,' and is free to look at the essence of things without too strict a regard to technicalities." King George was therefore advised that it would be equitable in view of all the circumstances to award the original sum of 835,000 bolivianos as principal, and 1,440,375 for interest, payable in bolivianos or in gold at the current rate. Chile complied; and the Alsop claim passed into history.

In law, the case was difficult; in equity, it was simple. Could the Government of the United States avail itself of a treaty made by the two contracting parties for its benefit? In law, the right was doubtful; in equity, it was clear, and the "amiable compositeur," rejecting the letter which killeth, and applying the spirit which maketh alive, found equity and justice synonymous and reëndowed the world with an agency through which both could be administered at one and the same time.[20] The dispute was submitted to King Edward and to his successor because the two countries had confidence in his justice and fairness. It was his opinion that was wanted—his opinion as a fair and upright man doing justice without being hampered or controlled by considerations of a technical character. The friendly compositor was thus free to compose the differences by compromise, or according to his sense of equity and justice. The contention of neither was fully admitted, but the dispute which had embittered the relations of the two countries was decided acceptably to each.

[20] The doctrine which His Majesty applied in deciding the Alsop difference is to be found in the leading—strict common lawyers are inclined to call it the "misleading"—case of *Lawrence* v. *Fox*, 20 New York, 268 (1859), in which the Court of Appeals of New York held that an action would lie and a recovery be had under a contract made for the benefit of a third person but to which he was not an express party.

The next and final step which we shall consider in this connection, is closer to judicial settlement; indeed, many hold that arbitration—for it is this remedy which now presents itself—is purely judicial. Many, on the other hand, admit that it may be, but that it is not necessarily so. There can be no doubt that in modern practice an arbitral award is a close approximation to a judgment in a court of justice, although the compromise of diplomacy or the prerogative of a friendly compositor may not be absent. In any event, the essence of arbitration, as differing from judicial settlement in the technical sense of the word, consists in the appointment of the arbitrator or judge by the parties in dispute, and its settlement "on the basis of respect for law." This may mean the taking of law into consideration but not attributing to it a deciding quality.

The history of arbitration is ancient and honorable. It requires a very high degree of culture for its application; and, if the award is to be on the basis of law, it requires, assuredly, law and a fair knowledge of its principles. The examples of ancient practice are of Greek origin. It is true that the Hellenic States were separate and distinct, and wars were so frequent between them that a pessimist might say they were a pastime of those enlightened and vivacious peoples. They differed among themselves and had a keen eye and ear for their differences. An apple woman in the streets of Athens detected, it is said, the foreign accent in Theophrastus, who addressed her. The language spoken in each of the countries was Greek, and they differed merely as dialects of that tongue—the Attic or Ionian being the Greek in its perfection, and the Greek of literature. Their religion had a common origin; and their Gods, wherever they were, spoke a Greek dialect. Their laws were different, but they were Greek in the sense that they had no suggestion of the Persian or of the foreigner in their make-up. Here was a case where a Greek city could hope

to have its difference with another Greek city decided by Greek judges of their own choice, on the basis of respect for Greek law.

There was a controversy between the island of Samos, closely adjoining the mainland of Asia Minor, and Prienè, an ancient city on the Ionian seacoast, concerning the position of a fort named Karion and the land surrounding it. As direct negotiations had failed to adjust the controversy, it was submitted by the parties in interest to a Rhodian commission consisting of five judges, which visited the disputed localities, listened to the claims of the parties on the spot, and decided the controversy at Ephesos. The facts are so typical that they may well be stated. It was asserted on one side, and denied on the other, that the occupation of Karion and its neighborhood was a modern encroachment. The arguments of the delegates were based upon inscriptions, upon written histories, and upon previous arbitrations. The award (variously estimated to have been rendered some two hundred and forty or one hundred and eighty years before the Christian era)[21] is very interesting. It reads as if it were delivered but yesterday, and is a confirmation of the popular saying that "nothing is new under the sun." The Reverend E. L. Hicks, from whom the statement is paraphrased, says of it in detail—and I caution you that it is not a modern hoax but an ancient inscription:

> The heading of the Rhodian award is happily preserved, and is very explicit. After giving the names of the *five* arbitrators, and of the delegates from Samos and Prienè respectively, and having stated the circumstances under which the award was delivered, the Rhodians proceed to affirm in brief that they hold the claim of Prienè to Karion and its environs to be fully proved (lines 1–27). They add that they have made two copies of the award, and have delivered one to the authorities at

[21] A. Raeder, *L'Arbitrage international chez les Hellènes* (Kristiania, 1912), p. 71, note 5.

Samos and the other to the authorities at Prienè (lines 27–44). Then there follows a recital at length of the arguments that had been employed on either side (lines 45–154). Finally the arbitrators sum up and pronounce judgment in favor of Prienè (lines 154–157). Appended was a specification of the exact boundaries between the Samian and Prienian lands: of this survey only the beginning is preserved (lines 158–170). Of the recital of the pleadings many lines have been lost. But enough remains for us to see clearly the precise questions at issue, the chief arguments urged by Samos and Prienè and the final award of Rhodes.[22]

Mindful of the injunction in the case of *Les Plaideurs*, let us skip from the ancient world and the Middle Ages and state that a citizen of New York, of whom all Americans may well be proud, introduced arbitration to the modern world in the Jay Treaty of 1794 with Great Britain. Chief Justice Jay secured what he had so long sought in vain, the settlement of outstanding differences between Great Britain and the United States by means of commissions; and the action of the mixed commission under Article 7 of his treaty was so satisfactory to the two countries, although the awards were overwhelmingly in favor of the United States, and has been so appealing to the nations at large, that the world is, as it were, surrounded by a net-work of treaties providing for the arbitration of outstanding difficulties of a judicial nature which diplomacy has failed to adjust. In a single year, Mr. Root, when Secretary of State, negotiated no less than twenty-six of them; and, in the century from Jay's treaty to the meeting of the First Hague Conference in 1899, it has been conservatively estimated that from one to two hundred agreements were made to submit disputes to arbitration—many of the agreements involving numerous cases.

Let us take one of these modern cases, in order that we

[22] Newton, *Ancient Greek Inscriptions in the British Museum*, Part 3, section 1, pp. 1–5, edited by Reverend E. L. Hicks; *see* "An Ancient Case of International Arbitration," *American Journal of International Law*, vol. V (1911), pp. 465–466.

may vie in peaceful rivalry with Ancient Greece. There was a Civil War in the United States from 1861 to 1865, and during this war it was alleged that Great Britain—which, in the opinion of the North recognized the belligerency of the South with undue haste—had, during the course of the war, allowed vessels of war to be built for the Confederate States, had supplied them in its ports with arms and munitions, provisions and fuel, and had, in addition, allowed its ports to be used as a base of hostile operations, in that Southern vessels excluded from the Southern States, were allowed to run in and out of British ports, to prey upon the commerce of the North found upon the high seas. These various indictments of Great Britain were declared by the government of the United States to have been in violation of the law of neutrality. This, Great Britain denied.

The views of the two countries were as wide apart as the pole of power is from the pole of justice. In 1863, Charles Francis Adams, our Minister to Great Britain, said in a note to Earl Russell, then Her Britannic Majesty's Principal Secretary of State for Foreign Affairs: "I am directed to say that there is no fair and equitable form of conventional arbitrament or reference to which they [the United States] will not be willing to submit."[23] To which Earl Russell replied some two years later and after the close of the Civil War, that the questions could not be considered to be arbitrable "with any regard to the dignity and character of the British Crown and the British nation. Her Majesty's government are the sole guardians of their own honor. They cannot admit that they have acted with bad faith in maintaining the neutrality they professed. . . . Her Majesty's government must, therefore, decline either to make reparation and compensation for the cap-

[23] Letter of October 23, 1863, *Papers Relating to Foreign Affairs* (1863), part II, p. 1246.

tures made by the Alabama, or to refer the question to any foreign state."[24] Eventually, however, an agreement was reached to submit the disputes, under the general name of the *Alabama Claims*, to a tribunal of arbitration, which met at Geneva in 1872, and rendered an award in favor of the United States in the amount of $15,500,000.

This tribunal, as in the Greek case, was composed of five arbitrators. They were not, however, all strangers to the cause—one being appointed by Great Britain, and one by the United States, and the others by Italy, Switzerland, and Brazil.

There was great difficulty in reaching an agreement upon the law that should be applied. Finally, however, the two Powers framed the so-called "Three Rules of Washington" and declared them to be applicable to the case, in addition to such principles of international law as the arbitrators should consider in point and not opposed to the Rules. In a word, the Rules provide that a neutral government is bound to use due diligence to prevent the fitting out within its jurisdiction of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace, and also to prevent departure from its jurisdiction of any such vessel, as well as not to permit its ports or waters to be used as a base of naval operations, and to prevent violation within its jurisdiction of its international obligations and duties.

Without dwelling upon the case, the award—which was eminently satisfactory to the United States, and in the long run to Great Britain, as it removed a bitter controversy from their foreign relations—was in substance a judicial decision, although it was delivered by judges of the parties' choice appointed after the controversy had

[24] Letter of August 30, 1856, *Papers Relating to Foreign Affairs* (1865), vol. I, pp. 536, 545.

arisen, instead of being decided by a bench of judges appointed before the controversy and without reference to it, and deciding it as a matter of course.

I have called attention to the "Three Rules of Washington" in order to show how even a temporary tribunal can perform the functions of a court of justice, if the nations in controversy prescribe the rules of law in being, or, if they are not in existence, create them for the case and direct their application. We are here upon the threshold of judicial decision.

The United States did not resort to a judicial tribunal, because none was created at that time, nor could either State then have summoned the other before the tribunal, if it had existed, because it is a fundamental principle of international law that, each State being independent, no State can compel another to appear even before a court of justice, in order to do justice. It is only by the consent of States that they submit their disputes to mixed commissions or tribunals of arbitration, or that they appear before courts of justice—a consent which may be given once and for all in a general agreement, or for a category of cases, or for each case as it arises.

Leaving out, for the moment, the question of consent, I would call your attention to the action taken at the First Peace Conference, which met at The Hague in 1899, called by the Czar of all the Russias to put a stop to the increase of armament, which was exhausting the resources, especially of Europe, and destroying the morale of its peoples. The Conference, while failing in this respect, had a number of Conventions to its credit, especially that concerning the Pacific Settlement of International Disputes.[25] It set the seal of its approval upon good offices, mediation, and commissions of inquiry. It declared arbitration to be the most equitable and the most effective means of settling disputes

[25] For the text of the Pacific Settlement Convention, see Appendix II, No. 4, pp. 272–298.

of a legal nature, and especially for the interpretation or application of international conventions which diplomacy had failed to adjust. It defined international arbitration in the sense in which I have already used it; and, in so doing, it internationalized arbitration, so to speak. It placed it upon a firm and solid footing by providing means of constituting the tribunal with judges of the parties' choice; and it drafted rules of procedure to be used by the tribunal in the absence of a provision to the contrary in the *compromis*, or special agreement, submitting the dispute to arbitration. This was not all. It formed an administrative council composed of the diplomatic agents of the countries accredited to The Hague, and it placed the Permanent Court of Arbitration, created by the Convention, under the supervision of this body; and the council appointed an international bureau to serve, as we would say, as a clerk's office, to the tribunal of arbitration. A word further. Each party to the Convention was to appoint not more than four persons possessing the qualifications of an international judge, and willing to serve as such. The names of such persons were to be sent to the international bureau, and a list of them prepared and sent to all the contracting governments. This formed the list or panel of judges of the Permanent Court of Arbitration; and from this list or panel each of the nations in controversy was to select two judges for the tribunal of their creation, and these four together would choose an umpire. Thus, in a court of five, two might be nationals of each of the countries in dispute, and this might make the umpire the sole arbitrator in the case, when the national members espoused the cause of their governments. In the Second Hague Peace Conference of 1907, this defect was obviated by the provision that only one of the two judges selected by each party in litigation could be its national.[26] The re-

[26] Article 45, Pacific Settlement Convention, Appendix II, No. 4, p. 284.

sult of this modification is fundamental. In a tribunal of five members, two only can be said to represent the views of the litigants, and the three chosen from third countries are indifferent to the controversy. A nearer approach is made to a court in the technical sense of the word. Of temporary tribunals chosen under the Pacific Settlement Convention and in accordance with its terms, and applying its procedure, there have been some nineteen cases to date; and, although elements may be present which suggest a compromise instead of a legal decision, the awards have given satisfaction, and, if not based exclusively upon law, they nevertheless show a respect for law.

Let us now revert to the consent of States to appear before a tribunal of arbitration or a permanent court of justice. The conception of State is here fundamental. Where the monarch of a country was looked upon as its master—where he ruled it as he did his estate, and centralized its government, concentrating in his hands all powers—the sovereign and the State were, in effect, one and the same person. He stood alone: he had servants and subjects; he did not have fellow-citizens. If, to this, it be added that he received his Crown not merely by the free consent of his people, but as a divine right, the breach was still further widened between king and subject. He was the State, and neither he nor the State could be sued, as it was in derogation of his dignity on the one hand, and of the rights of the State on the other. When, however, the conception changed to the effect that authority resided in the people, and that the government of the State was the agent of the people, within certain prescribed limits, for clearly defined purposes, there was no compelling reason why the agent should be immune from suit, although it might be objectionable to allow suits to be lightly or frivolously brought.

It has been pointed out that the old conception lingers

after it has ceased to correspond to the facts, or that the form survives after the substance has changed. This survival is noticeable in the United States after the Declaration of Independence and indeed after the adoption of the Constitution. The consequences which properly flow from the change in the source of authority have not been drawn, or at least they have only been sketched by a sparing hand. Thus, in that classic of political government called *The Federalist*, Alexander Hamilton, writing in 1788, could say without fear of contradiction:

> . . . It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States.[27]

There have been various reasons given at different times in justification of this exemption. One is stated by Mr. Justice Field in *The Siren*. In delivering the opinion of the Supreme Court that eminent Judge said:

> It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They can not be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress.[28]

[27] Paul Leicester Ford, *The Federalist* (1898), pp. 545–546.
[28] 7 Wallace (1868), 152, 153–154.

The reason has been stated somewhat differently, but to the same effect, by Mr. Justice Holmes in rendering the opinion of the Supreme Court in a Hawaiian case:

> Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (Leviathan c. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.[29]

An example of public interest is to be found in the suit which one Nathan brought, in 1781, against the Commonwealth of Virginia. He sought to have attached, in Philadelphia, a quantity of clothing imported from France, and on its way to Virginia. The delegates to Congress from that Commonwealth conceived his action to be a violation of the law of nations, and had the writ of attachment set aside. This was at the very time when Cornwallis was besieged at Yorktown, and the argument advanced by counsel for Virginia was that "any disaffected person, who happened to be a creditor of the United States, might injure our public defence, and retard or ruin the operations of a campaign; that he might issue an attachment against the cannon of General Washington, or seize the public money designed for the payment of his army."[30] It may be added that, at that very moment, Hamilton, whose view as to immunity of sovereignty from suit except at its own consent has been quoted, was at Yorktown, a Colonel in the Continental Army, through whose victory, in conjunction with the French, the independence of these United States and their immunity from suit from any quarter were assured.

[29] *Kawananakoa* v. *Polyblank*, 205 United States, 349, 353 (1907).

[30] *Simon Nathan* v. *Commonwealth of Virginia*, Common Pleas, Philadelphia County, Pennsylvania, 1 Dallas, 77 note, 79 (1781).

Finally, a few words may be quoted from the opinion of Chief Justice Taney in the case of *Beers* v. *The State of Arkansas*. Speaking for a unanimous Court, he said:

> It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.[31]

We have here in these different quotations, the statement squarely made, that immunity from suit is inherent in sovereignty; that a suit by an individual against the United States is not to be entertained without the consent of the United States evidenced by act of Congress; that the States of the American Union possess immunity from suit at the instance of an individual before the Constitution went into effect; that a State of the Union can only be sued by an individual with its own consent, according to conditions which it prescribes, and that this principle applies to all suits between States. It is the law between nations as well. Yet, assuredly, one of the purposes for which governments have been created is to do justice to their citizens; and, in the modern conception, the agent can not, in the long run, claim to be above the source of its authority.

The Congress of the United States has recognized this by referring claims against it to federal courts, and eventually creating a Court of Claims, in which the government of the United States allows itself to be sued by citizens upon cases arising out of express or implied contracts. The jurisdiction is indeed limited in extent; but,

[31] 20 Howard, 527, 529 (1857).

such as it is, it is open not merely to citizens of the United States, but to foreigners. A provision of Congress allows foreigners whose governments permit themselves to be sued, to sue the United States on a footing of equality with American citizens; and as most foreign governments permit suit to be brought, it is obvious that the United States has given consent to be sued in matters of contract upon a very large scale.[32] The importance of this fact is very great; for, in allowing American citizens and foreigners upon terms of reciprocity to bring suit against the government of the United States, the rule of immunity is renounced in some cases, and questioned in all. If it only be understood that the greatest interest of the public is that justice be done, a way will assuredly be found to bring suits in such a manner as to procure justice to the individual against the government, without prejudicing or sacrificing the interests of the State.

But, although the sovereignty of the State over its citizens has been rejected as inconsistent with democratic conceptions of government, and the citizens are enthroned, as it were, in the seats of the mighty, yet the conception of sovereignty in international law is intact although questioned. States may consent to be sued by their own citizens, but the citizens of a foreign State have no inherent right to sue a nation in international law. The foreigner is not its citizen; he is not its subject; he is not even in an infinitesimal degree its master. The evils apprehended in the suit of a citizen or subject against a State may be illusory, but they are real to the foreign State against which an injunction might be sought in court, and its

[32] See statement of Mr. Justice Nott in *Brown* v. *United States*, 6 Court of Claims Reports, 171, 192 (1870), paragraph 2.

In 1909, the Department of State of the United States had occasion to instruct its diplomatic agents accredited to foreign countries to ascertain the conditions upon which the governments to which they were accredited allowed themselves to be sued, and to report the results of their investigations to the Department. The replies received amply confirmed the statement of Mr. Justice Nott.

hands restrained. The idea of immunity from suit without consent so impregnates the practice of nations that Chief Justice Fuller was able to say in behalf of the Supreme Court, in a case at the close of the last century:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.[33]

It is not at all improbable that nations may renounce the immunity of a sovereign State by allowing themselves to be sued in a court of justice of their own creation within a limited category of cases, espousing only such claims of their citizens or subjects against foreign governments as they may approve, and as they would be willing to have brought against them if they should be invited before the court as defendants instead of appearing as plaintiffs. In the absence of a statement of the principles of justice obtaining within national lines, expressed in rules of law which the States have through their accredited agents made and adopted, it is improbable that even this limited consent to suit will be accepted by the nations at large, inasmuch as the Great Powers appear to be unwilling to subject their vast interests to the judgment of a tribunal without fixed, certain, and accepted rules of law for the decision of their controversies even of a legal nature. With, however, a Permanent Court of International Justice in being at The Hague; with a strong current of opinion in favor of a statement of the principles of international law in the form of a code, it is probable that the time is not distant when, at least within modest limits, the renunciation of immunity from suit may be expected.

The Supreme Court of the United States has been the prototype of the Permanent Court of International Jus-

[33] *Underhill* v. *Hernandez*, 168 United States, 250, 252 (1897).

tice. Its experience has shown that States of the American Union can safely sue one another in the Supreme Court without limitation; and who knows but that the American experiment may, in the course of time, lead even to a general consent, if only an agreement upon the law to be applied be forthcoming? In his opinion in a famous case decided in the House of Lords in 1844, Lord Campbell was moved to say:

> I can not refrain from asking your Lordships to consider how the subject has been viewed by our brethren in the United States of America. They carried the common law of England along with them, and jurisprudence is the department of human knowledge to which, as pointed out by Burke, they have chiefly devoted themselves, and in which they have chiefly excelled.[34]

[34] *Regina* v. *Mills*, 10 Clark and Finnelly, 534, 777 (1844).

IV

THE SUPREME COURT AND SUITS BEFORE IT

In speaking of the Supreme Court of the United States, Sir Henry Sumner Maine informs us that "there is no exact precedent for it, either in the ancient or in the modern world." He further says that it is "not only a most interesting but a virtually unique creation of the founders of the Constitution." And he further states, in the short passage from which I have borrowed a phrase here and there, that "the success of this experiment has blinded men to its novelty."[1] I should like to think that these statements are true; and, as they are very flattering to our forefathers, it does not lie in the mouth of an American to contradict them. And yet the statements are not quite fair to England, the country from which we have derived those conceptions of liberty which have made of the Federal Government and of every State of the Federal Union a government of laws and not of men.

There are those who believe that no two things are ever alike. In this sense of the word, Sir Henry Maine's statement is accurate. The Supreme Court of the United States has "no exact precedent"; but, to a certain extent, the Supreme Court is assuredly a development, and a development of English practice in respect to the English-speaking Colonies of North America.

The various voyages of discovery to the New World were made by the Crown of England; the Charters to the Colonies were made by the Crown of England; the Colonies were governed by the Crown of England. The

[1] *Popular Government* (1886), pp. 217, 218.

King, of course, did not always act alone. He was or could be restrained by Parliament; and Parliament eventually assumed the place of sun in the colonial system of England and of Great Britain; and of course a statute made by the joint action of the House of Commons and the House of Lords and the King was indeed the supreme law, for it was not only the act of the Executive but also of the complete executive and legislative powers: the Crown, the lords, and the commons. The King was assisted by a Council over which he presided, and in whose deliberations he took part. Later he attended only occasionally, and the Council acted in his absence, but still in the name of the King in Council and with the King's approval.

For the Colonies, the Crown was the center of the system. They were not represented in parliament; as English foreign bodies politic, they were united with England through the Crown and a common allegiance to it, in a less conscious way than are the self-governing dominions of the British Empire; and the Colonies themselves, which Mr. Justice Iredell calls provinces, were foreign bodies *inter sese*, united, if at all, by allegiance to a common head.

If there was a dispute, and there were many, between two of the provinces in the matter of boundary—for the charters were overlapping and would almost seem to have been made for the lawyer so provocative were they of dispute—the Colonies could not themselves decide their difference, because they were not independent States, although foreign to one another. Their recourse was to the common head of both, whose decision would therefore bind both and settle the quarrel. The Crown in Council decided political questions; it ordinarily referred judicial questions to a judicial body, or it appointed a committee of the Council to consider the matter in the light of an argument of counsel and to report its recommendation to

the Council. With the approval of the King in Council, the decision of that body became as a law to the parties.

As examples of this process, I refer to two cases in which Rhode Island was involved; the first with Connecticut, its neighbor to the west; the second with Massachusetts, its neighbor to the north and to the east; and to the case of *Pennsylvania* v. *Lord Baltimore*, in which the long drawn-out boundary dispute between Pennsylvania and Maryland was settled, and, in consequence, the line of Mason and Dixon was drawn, a line destined to be more famous than even the litigants and their surveyors could have imagined.

Rhode Island had a charter as had Connecticut; that of Rhode Island was granted in 1663; that of Connecticut, a year earlier. The interpretation of the charter was an interpretation of a written instrument, and therefore a judicial question, to be determined by the King in Council at the request of the Colonies or by a judicial body to which it might be referred. The boundary line between Rhode Island and Connecticut was in dispute for many years. It was submitted to the King in Council, and after hearing argument of the agents and lawyers of the parties, it was determined in 1727, in accordance with an agreement of 1703 between the commissioners of the Colonies, appointed in October, 1702, for settling their boundaries. This is the language of the decision:

> All which being Considered by their Lordships tho' the Red Line in the annexed Mapp is what the Rhode Island people insist on as the true Boundary between them and Connecticut according to their Charter, Yett as the Green Line in the said annexed Mapp was determined in 1703 to be the Division Line between the two Colonys by the Commissioners of each Government respectively appointed for that purpose, Their Lordships are humbly of [the opinion] to advise his Majesty that he would be graciously pleased to Signify his pleasure that the Boundary Line between the said two Colonies as described by the aforesaid Green Line may for ever hereafter be the Settled Boundary between the

said two Colonies of Connecticut and Rhode Island and Providence Plantations.[2]

Rhode Island had a hard time of it with its neighbors. They were larger and more powerful, and, although only provinces, they coveted its territory as is the wont of nations. It is also a fact that they did not like Rhode Island, and that, indeed, they had a contempt for it. Under these circumstances, the feelings of Rhode Island toward its neighbors may be imagined without stating them. It looked upon the King in Council as a protector; and, having sought his intervention against Connecticut, it sought his aid against Massachusetts. The disputes between the two, submitted to the Council, were decided in 1746.

I can best, for present purposes, read a head-note which I have made of the case:

A controversy between colonies is a judicial question, and, upon request or petition of one or other, or both, of the colonies, the King in Council will entertain jurisdiction thereof, decide the controversy, and issue *interim* instructions to prevent disturbances in the disputed region *pendente lite*.

A controversy submitted to the King in Council will be considered by the Committee for Hearing Appeals from the Plantations and referred by that body to the Lords Commissioners of Trade and Plantations, before which agents and counsel of the colonies are heard and, in appropriate cases, a commission, composed of residents of the adjoining colonies, will be appointed to hear and to determine the controversy in accordance with instructions prescribing the procedure to be followed, drafted by the Lords Commissioners and approved by the Committee for Hearing Appeals and by the King in Council.

Two persons are to be appointed to represent the colonies in litigation upon whom process may be served, and upon the failure of one or the other of the colonies to present its case before the Privy Council or before

[2] *The Colony of Rhode Island* v. *The Colony of Connecticut*, Privy Council (1727), 3 Acts of the Privy Council, Colonial Series, 10, 16. J. B. Scott, *Judicial Settlement of Controversies as between States of the American Union*, vol. I (1918), pp. 573, 576.

the Commission, the colony presenting its case may proceed *ex parte* and judgment had by the Commission in the premises.

The costs of the proceedings are to be divided equally between the litigating colonies.

The award of the commission so appointed is transmitted to the Privy Council for its consideration and eventual approval or disapproval. From the final approval of the award by the King in Council there is no appeal.[3]

The cases between these three colonies and their settlement by the King in Council were as important in themselves as beneficent in their results. They did not, however, impress the imagination, either of the colonies or of the Crown, as did the case between Pennsylvania and Maryland. Lord Chancellor Hardwicke of England was deeply affected by the majesty of the occasion, saying in the very opening words of his opinion:

I directed this cause to stand over for judgment, not so much from any doubt of what was the justice of the case, as by reason of the nature of it, the great consequence and importance, and the great labour and ability of the argument on both sides; it being for the determination of the right and boundaries of two great provincial governments and three counties; of a nature worthy the judicature of a *Roman* senate rather than of a single judge; and my consolation is, that if I should err in my judgment, there is a judicature equal in dignity to a *Roman* senate that will correct it.[4]

The question then up for settlement was one of vast importance, and the decree was indeed equal in dignity to that of the Roman senate. The facts in the case are for us just facts. Only a word or two need be said about them. Lord Baltimore was granted a charter to Maryland in 1632 in which his province was bounded on the north by the 40° of latitude, that is to say, where the City of

[3] *The Colony of Rhode Island* v. *The Colony of Massachusetts*, Privy Council (1746), 3 Acts of the Privy Council, Colonial Series, 436. Headnote from J. B. Scott, *Judicial Settlement of Controversies between States of the American Union* (1918), vol. I, p. 577.

[4] *Penn* v. *Lord Baltimore*, Chancery (1745) Ridgway Cases, *tempore* Hardwicke, 332, 446; 27 Reprint, English Reports, 847. J. B. Scott, *op. cit.* vol. I, pp. 585, 590.

Philadelphia now stands, at the juncture of the Delaware and Schuylkill rivers and from this point Maryland proceeded westward. This would have included, according to Lord Baltimore's interpretation of the charter, what is now the State of Delaware with a goodly slice of Pennsylvania. In 1681, Charles II granted to William Penn the vast tract of territory named Pennsylvania in his honor; and, in 1682, the Duke of York, the King's brother, three years later himself king as James II of England and VII of Scotland, deeded to Penn the three lower counties of Pennsylvania which were erected into the State of Delaware in 1776. The successor of the original Lord Baltimore was a careless person. The descendants of Penn were different from my Lord Baltimore in this respect, and indeed in others. They were Quakers as was the great William; and, while following the inner light in spiritual matters, they were not, at least in this case, averse to a good bargain. By the articles of various agreements, the Baltimores prejudiced their rights and sacrificed their claims. The agreement of 1732 was presented to the Council; as a written document, and, therefore, as a judicial question, it was referred by the Council to the Court of Chancery. Under the English system of law of that day and until recently, this Court was the one judicial body to decree specific performance of an agreement, that is to say, to cause the terms of the agreement to be carried out specifically, instead of awarding compensation in damages for a failure of performance. Lord Chancellor Hardwicke decreed specific performance of the articles as prayed for by the Penns; and there were drawn the boundaries of the three counties, and the boundary between Pennsylvania and Maryland, which was to become, as I have indicated, very famous in the annals of political history as the boundary between the northern and the southern States of the Union. It is evident that precedents in substance, if

not in form, were at hand and within the knowledge of the "founders of the Constitution."

The method of arbitration by temporary courts or commissions adopted by the Articles of Confederation has to its credit the decision of a famous controversy; but this method does not appear to have appealed to the imagination of the people of the day, and, in any event, it did not justify itself in the minds of the framers of the Constitution. In the second attempt to settle the differences between the States, it would seem that the great and leading case of *Penn* v. *Lord Baltimore* inclined the lawyers of the Federal Convention to submit controversies of the State and the Union to a permanent Court of Justice. And it is interesting to note that in controversies between States of the American Union, to which indeed the Government of the United States has been a party, the procedure of equity, obtaining in the English court of chancery, has been adopted as more suited than that of the common law for the "determination of the right and boundaries" of States as the successors of the great provincial governments.

In the Articles of Confederation,[5] the American States, declaring themselves to be sovereign, free, and independent, renounced the sovereign power of making treaties or alliances with the outside world, and restricted themselves to compacts between themselves with the consent of Congress. In effect, they renounced diplomacy in the settlement of their disputes; but, recognizing that there must be some method of settling them if they were not to resort to arms, which they had foresworn in the Articles, they bethought themselves, it would seem, of colonial procedure and practice. There was no longer a King; and there was no longer a Council. There was, however, a President of the Congress, and there was a Congress in which each State voted as a unit, although it might have

[5] See Appendix II, No. 1, pp. 262–264.

not less than two nor more than seven members in that body. As the King had become a nonentity in the Council, the President of the Congress was overlooked in the American adaptation, and the method proposed for settling disputes concerning boundaries and all other matters between the States was the appointment of a committee through the Congress, just as the Council itself had formed a committee to consider, decide the case, and report to the King in Council. The lawful agents of the States were, upon the order of Congress, to appear at a date assigned and "to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question." It was necessary to create the court because there was then no court of the United States in being other than the Court of Federal Appeals in prize cases forced upon the States by the circumstances of the time for a particular purpose and destined to go out of being when there were no more prize cases to be decided. There were indeed courts in each of the thirteen States; but our Revolutionary forefathers had either not as yet risen to the conception of a court of the States, or had not as yet taken steps to create it.

It was foreseen, however, that the agents might not agree. Therefore, some means should be taken to constitute the commission or court at the request of the agent and of the other State in controversy. Upon their failure to agree, the Congress was to name three persons from each of the thirteen States, making a panel of thirty-nine persons from which each party, beginning with the petitioner, was alternately to strike a name from the list, until the number should be reduced to thirteen, the number of the States. Of course, this did not mean that each State was to be represented in this list, but that the number was to be thirteen, apparently corresponding to the number of States. From this reduced panel, from which presumably names of persons had been rejected who were, for one

reason or other, undesirable to the States in controversy, not more than seven or nine names, as Congress should direct, were to be drawn by lot, in the presence of Congress; and the persons so selected, or any five of them, were to be the commissioners or judges "to hear and finally determine the controversy," provided that a majority of the judges hearing the cause should concur in the judgment.

So far, the selection of the court might be by one of two methods: first, the appointment of the court by the agreement of the lawful agents of the parties; second, if the agents were unable to agree, the selection of the court from a list proposed by the Congress to the agents. The third and final recourse, that there might be no denial of justice, was that—upon the failure of either party, without sufficient reason, to attend at the date appointed, or upon the refusal of either party, if present, to strike—the Congress itself should take charge; and not only should the Congress appoint the panel of thirty-nine, three from each of the United States, but the Secretary of Congress should strike in behalf of the lawful agent "absent or refusing."

In any event, there was to be a court. The judgment or sentence of the court thus appointed, was to be "final and conclusive." If, however, one of the parties refused to submit to the court, or to appear before it and defend the claim or cause, the court was to proceed in the absence of such party to render a decisive judgment or sentence. This was likewise the procedure of the King in Council. The judgment or sentence and the proceedings were in every case to be transmitted to Congress and lodged among its acts "for the security of the parties concerned." This, again, was the procedure of the King in Council.

On March 1, 1781, the Articles of Confederation went into effect, upon their signature by Maryland, the last of

the thirteen original States to accept that instrument of government. There was at that time and for years previously a bitter dispute between Connecticut and Pennsylvania respecting "sundry lands lying on the east branch of the river Susquehanna,"[6] now forming the county of Luzerne in Pennsylvania, named in honor of the French Minister to the United States whose services to the State and Union seemed to the good people of that day to justify this mark of appreciation. It was in the interest of both states to have the controversy settled, for blood already had flowed, and the inhabitants of the region were in great distress. Pennsylvania, therefore, proposed "a hearing in the premises, agreeably to the 9th Article of the Confederation."[7] Monday, June 24, 1782, was assigned for the appearance of the States by their agents, who duly appeared. Connecticut, however, was apparently not sure of its case and adopted dilatory proceedings, so characteristic of a private litigant doubtful of his cause but anxious to preserve his right. Therefore, the agents of Connecticut proposed to adjourn the proceedings until "after the termination of the present war."[8] The motion was denied. Apparently the credentials of the agents of Pennsylvania were faulty. The new ones presented on July 16, 1782, were objected to by Connecticut. This was again a proceeding not unknown in the administration of justice. The objection was overruled; and the agents of the two States were directed to "appoint by joint consent commissioners or judges, to constitute a court for hearing and determining the matter in question, agreeably to the 9th Article of the Confederation."[9]

On Monday, the 12th of August, 1782, Congress was

[6] *Pennsylvania* v. *Connecticut,* Court of Commissioners under 9th of Articles of Confederation (1782), 131 United States, Appendix, liv. J. B. Scott, *op. cit.* vol. I, p. 601.

[7] *Ibid.*

[8] *Ibid.,* lv.

[9] *Ibid.*

informed that the agents had agreed upon William Whipple of New Hampshire, Major General Nathaniel Greene of Rhode Island, David Brearley and William Churchill Houston of New Jersey, Cyrus Griffin and Joseph Jones of Virginia, and John Rutledge of South Carolina. Of these seven, it was agreed that any five should form the court and determine the case. William Whipple originally followed the sea. He was a signer of the Declaration of Independence and, in the Revolution, a Brigadier-General. In 1782, he was appointed a judge of the Supreme Court of New Hampshire. General Greene was not a lawyer, but a man of character as well as of ability. David Brearley was a lawyer by profession, and Chief Justice of New Jersey at the time of his appointment. His colleague, Houston, was a professor at Princeton, and, in 1783, resigned his professorship, having, it is said, "in the midst of his multifarious occupations, acquired sufficient knowledge of the law to be admitted to the bar." Cyrus Griffin had been judge of the Federal Court of Appeals of Admiralty in prize cases, and was later to be a judge of the United States Federal Court under the Constitution. Joseph Jones had held a judicial position in Virginia and was a friend of Washington and uncle of James Monroe. And John Rutledge was no less a person than a future Chief Justice of the United States. General Greene, however, could not attend; Mr. Rutledge declined; and Thomas Nelson of Virginia and Welcome Arnold of Rhode Island were chosen in their stead. Thomas Nelson was not a lawyer; he was, however, a great patriot, and, as Governor of Virginia and commander of its militia at Yorktown, received the highest praise from Washington for his "activity, emulation, and bravery." Welcome Arnold was a prominent merchant and politician. The Court was eventually composed of Messrs. Whipple, Arnold, Brearley, Houston, and Griffin.

The Court convened and began its sessions at Trenton, New Jersey, on November 12, 1782, and, on December 30, 1782, it rendered the following judgment or sentence:

> We are also unanimously of opinion that the jurisdiction and preemption of all the territory lying within the charter boundary of Pennsylvania, and now claimed by the State of Connecticut, do of right belong to the State of Pennsylvania.[10]

The victory was for Pennsylvania, but in a larger sense it was the victory of judicial settlement. It created a great stir in the land. It impressed the imagination of the people to such an extent that no less a person than Robert R. Livingston, then Secretary of Foreign Affairs of the United States, hailed it as the beginning of a new era, which it was. In a letter to Lafayette, under date of January 10, 1783, he wrote as a lawyer, judge, statesman, and prophet:

> The great cause between Connecticut and Pennsylvania has been decided in favor of the latter. It is a singular event. There are few instances of independent states submitting their cause to a court of justice. The day will come, when all disputes in the great republic of Europe will be tried in the same way, and America be quoted to exemplify the wisdom of the measure.[11]

[10] 131 United States, Appendix, lvii.

[11] Francis Wharton, *Diplomatic Correspondence of the American Revolution,* vol. VI (1889), p. 202; see also Jared Sparks, *The Diplomatic Correspondence of the American Revolution,* vol. X (1830), p. 21.

A Court was appointed by agreement of the agents of Massachusetts and New York in 1785. It did not meet, however, as the controversy was adjusted the year after, by agreement of the parties. In 1786, South Carolina and Georgia appealed to the Congress to settle a boundary dispute between them. Their agents were unable to agree upon the composition of the Court, and the method of striking was resorted to. The Court was formed by this method under the 9th of the Articles of Confederation, but it did not meet, as the case was settled by compact between the two States. The net result of procedure under Article 9 was the trial and final determination of one case (*Pennsylvania* v. *Connecticut*); the appointment by mutual agreement of commissioners in two controversies, settled, however, out of court (*Massachusetts* v. *New York; South Carolina* v. *Georgia*); with petitions for the appointment of a court in some three other cases.

For full details of the origin and history of this method of settling disputes under the 9th Article, and the procedure to be followed under its provisions, see, J. C. Bancroft Davis, "Federal Courts Prior to the Adoption of the Constitution," 131 United States Reports, Appendix, l–lxiii.

When, on the 15th day of June, 1922, the Permanent Court of International Justice sat in formal session in the Peace Palace at The Hague, Livingston's prophecy was more than realized.

In the first draft of the Constitution, reported to the convention on August 6, the 9th Article of the Confederation for the settlement of disputes between the States was included in the draft of Article IX, and the exercise of the duties under this article was vested in the Senate as the representative of the States of the Union. This would have been the adoption and perpetuation of the King in Council in the form which it had assumed at the hands of the Congress of the Confederacy. When this article of the draft was up for consideration on August 24th, John Rutledge, destined to be Chief Justice of the Supreme Court, objected to the article on the ground that, necessary in the past, it was unnecessary in the future, as they were to have a court.

The immediate result (what the ultimate result will be beyond the United States no man can determine) may be stated in a few words taken from the third article of the Constitution. After vesting the judicial power of the States in one Supreme Court, the article extends the judicial power "to controversies to which the United States shall be a party; to controversies between two or more States; . . . between a State or the citizens thereof, and foreign States, citizens or Subjects."

The matter seems simple to us to-day, accustomed as we are to judicial settlement. It is none the less a triumph, as great as it seems to us to be simple. And just as the decision of the case of Connecticut and Pennsylvania under the Articles of Confederation was mentioned as a precedent, the Supreme Court of the United States, more fortunate than its immediate predecessor, has not only been mentioned but has become the great, and as time has

proved, resistless model of judicial settlement between the nations of the world.

The first duty of a court of limited jurisdiction—and, in the phase of the Supreme Court which interests us, its original jurisdiction is limited to suits between States and to suits to which the United States may be a party—is to decide whether the case laid before it falls within its competence. It does if it be a suit between States of the American Union. If the case is not within its jurisdiction, then the court should not, and in law it can not, entertain and attempt to decide it. In such a state of affairs—to use a technical phrase—any judgment which it might seek to render would be *coram non judice*. It does not follow, however, that because the court may assume jurisdiction, it will render a judgment in favor of the party bringing the case before it. This depends upon the proof submitted, for the case must be made out; otherwise, the court has nothing before it upon which to decide. Nor does it follow that a judgment will be rendered even if the facts as established make out a case, for a principle of law applicable to the situation may be lacking. There are, therefore, certain matters which meet us upon the threshold: the first is the nature of the suit, or case, or controversy of which the court may assume jurisdiction; another is the nature and extent of the jurisdiction; still another is the law to be applied; and, finally, the procedure before the court, supposing that it has jurisdiction, that a proper case is before it, and that the law is at hand.

The first section of the third article of the Constitution provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." For present purposes, we need consider only the judicial power vested in the Supreme Court. By the second section of the article, the judicial power is extended

"to Controversies to which the United States shall be a Party;—to Controversies between two or more States." This is but a phase of the court's jurisdiction, but it is very large and important, as we shall see; it is also the one with which we have to deal.

To make it clear, however, that the Supreme Court of these United States is a court of the States, and is international as far as they are concerned, and international in the sense of international law, attention should be called to other branches of its jurisdiction, although we may not dwell upon them. It is sufficient to say that the judicial power of the United States extends to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction." The framers of the Constitution recognized the importance of these different branches of the court's activity, declaring that of some cases it was to have original jurisdiction—that is to say, that the case should be or might be begun in the Supreme Court. This is declared to be so in the second clause of the section, "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."

It is to be observed that, in speaking of suits to which the United States or the States shall be a party, the word "controversy" is used in the first clause of the section, whereas, in the second clause, the court is to have original jurisdiction "In all Cases . . . in which a State shall be Party." It would appear, therefore, that "controversy" and "case" are used indiscriminately in the sense of suit, and yet a distinction is drawn between the two which should be mentioned. I have invoked on various occasions

the authority of Mr. Justice Iredell, not only because of his ability, evidenced by his decisions and by the crowning fact that his dissenting opinion in the Chisholm case was, as already said, approved by an amendment to the Constitution of the United States, but also because his testimony is that of a contemporary, which is held by the common law to be the best of all.

In the Chisholm case, this very learned and accurate Justice, whose authority can not be gainsaid, in the twofold character of lawyer and witness, had occasion to refer to an act of Congress—the Judiciary Act of 1789—creating the Federal system of judicature and carrying into effect the provisions of the Constitution concerning the judicial power of the United States. "The act of *Congress*," he said, "more particularly mentions *civil* controversies, a qualification of the general word in the Constitution, which I do not doubt every reasonable man will think well warranted, for it cannot be presumed that the general word 'controversies' was intended to include any proceedings that relate to criminal cases, which in all instances that respect the same Government only, are uniformly considered of a local nature, and to be decided by its particular laws."[12]

This distinction, to which attention is called in the passage quoted from Mr. Justice Iredell, is fundamental, and therefore it still exists. In an opinion rendered in 1887,[13] Mr. Justice Field, sitting at circuit, had occasion to consider the terms *cases* and *controversies*. If a *controversy* is to be distinguished from a *case*, he was of the opinion that the case was larger than the controversy, inasmuch as the latter only includes suits of a civil nature. For the distinction, he relied upon the opinion of Mr. Justice Iredell in the Chisholm case. With this intro-

[12] *Chisholm* v. *Georgia*, 2 Dallas, 419, 431–432 (1793).
[13] *In re Pacific Railway Commission*, 32 Federal Reporter, 241 (1887).

duction, he proceeds to a consideration of the terms, saying,

> By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.[14]

The authority of Chief Justice Marshall dominates this matter, as it does all branches of the judicial power of the United States. For this reason, I shall lay before you a few of his utterances, or holdings. At one time in his career, he was a member of the House of Representatives, and, in a very important speech, he had occasion to consider the subject which detains us. In the course of his remarks on the case of one Robbins, involving the question of extradition, he said:

> By extending the judicial power to all cases in law and equity, the constitution has never been understood to confer on that department any political power whatever. To come within this description, a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.[15]

In various causes in which he delivered the opinion of the court, he defined the terms which interest us. Thus, in the great and leading case of *Cohen* v. *Virginia*,[16] he said:

> A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either.

[14] *Ibid.*, 255.
[15] *Ibid.*, 256.
[16] 6 Wheaton, 264, 379 (1821).

In a later portion of his opinion,[17] he added:

> The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right, under such law, is asserted in a Court of justice. If the question cannot be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a Court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend.

This, however, was not all he said in the opinion of the Court, which is relevant to the topic in hand. In the passage immediately following the one which I have quoted, he defines the term which is broad enough to cover both *case* and *controversy*. To his query, "What is a suit?" he answers,

> We understand it to be prosecution, or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a Court of justice. The remedy for every species of wrong is, says Judge Blackstone, "the being put in possession of that right whereof the party injured is deprived." . . . Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.[18]

There is a further passage from the same case which can not be overlooked, as it deals with the beginning and conduct of the dispute: "To commence a suit," he informs us, "is to demand something by the institution of process in a Court of Justice; and to prosecute the suit is, according to the common acceptation of language, to continue that demand."[19]

It will be observed that Chief Justice Marshall eliminates from judicial power political questions. This distinction exists in the nature of things, and is a question

[17] 6 Wheaton, 405.
[18] *Ibid.*, 407–408.
[19] *Ibid.*, 408.

for the determination of the legislature, not for the court. In view of the importance of this distinction, a few lines from a later decision of the Supreme Court to this effect will not be out of place. In the *State of Georgia* v. *Stanton* (then Secretary of War), it is said:

> In order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, . . . must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.[20]

Lest an appeal to authority in so simple a matter should become wearisome, I shall draw your attention to but one further statement of the *case* and the *controversy*, taken from the opinion of William L. Putnam, a Circuit Judge of the Federal Court, who had had international before having judicial experience. From his opinion in *King* v. *McLean Asylum*, decided in 1894, I lift the following passages:

> The appellees rely on a supposed distinction between the use of the word "cases" and the word "controversies" in the section of the constitution defining the federal judicial power. That section uses the word "cases" in the first three clauses, namely, "cases, in law and equity," arising under the constitution and the laws and treaties of the United States, "cases affecting ambassadors, other public ministers and consuls," and "cases of admiralty and maritime jurisdiction." So far it has relation mainly, although not entirely, to the subject-matter of the litigation, and not to the parties involved. It then changes to the word "controversies," and uses this with reference to "controversies to which the United States shall be a party," "to controversies between two or more states," and then, without repeating the word, continues, "between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." . . . The change under consideration, from the word "cases" to the word "controversies," will be found to have been a mere matter of style, and to have no relation to any limitation or

[20] 6 Wallace, 50, 76.

extension of the class of questions to be adjudicated. As we have already said, so long as this section of the constitution speaks especially with reference to the nature of the questions involved, it uses the word "cases," but, when it considers more particularly proceedings having relation to the existence of parties, it uses the word "controversies," probably because, when parties are spoken of as arrayed against each other, literary style suggested the change.[21]

Let us suppose that the suit, the case, or the controversy has been brought before the court. What will that body do with it? If it is a political question, the court will in ordinary course reject it without further ado. But we are not dealing with a question in ordinary course; we are dealing with controversies between States; and, in ordinary course, a court does not, and indeed can not, entertain the suit, the case, or the controversy. The State, as has been pointed out on more than one occasion, can be sued only by its consent; and only to the extent to which its consent is given, and provided that the consent once given, has not been withdrawn.

Before the Constitution, or, it is proper to say, before the Articles of Confederation, a State of the American Union could not be sued. There was a precedent for it, to be sure, in the suit of province against province, or colony against colony, before the King in Council — a precedent not lost upon the Revolutionary statesmen, who in first instance followed rather closely the colonial experience in rendering a State liable to a Committee of the Congress, as the colony had been liable to be summoned before the King in Council or a Committee of the Council, to be further modified by a provision of the Constitution that State might sue State in the Supreme Court of the United States.

Assuredly, here is consent; for we have seen in a preceding lecture that the sovereign, free, and independent States of the Confederation sent their delegates to the

[21] 64 Federal Reporter, 331, 335, 336.

Federal Convention, where they renounced expressly the immunity from suit which the State of constitutional or international law enjoys. By extending the judicial power of the United States to controversies between States, they parted with the exercise of one of the powers of sovereignty.

It is to be observed that the consent given is general, not special. It is general in that it is not conditioned upon circumstances, other than that the proceeding shall be in the Supreme Court of the States. It is special, in that the suit can be only for a purpose or a category of purposes. There are no words of limitation in the delegation of power, and, there being none, none can be read into the general clause. This would seem to be clear upon a mere inspection of the Constitution; and yet, the right is one of such a high nature, concerning as it does the prerogatives of sovereignty, that we must not trust our unaided judgment, but take the opinion of the Supreme Court itself in officially and judicially interpreting the Constitutional clause on this—for the present occasion—most important of points.

In the course of this lecture, two suits to which the little Commonwealth of Rhode Island was a party, have been cited as examples of the nature and extent of the jurisdiction of the King in Council in good old colonial days. It happens that the Commonwealth of Rhode Island, the smallest state of the American Union, as it was the smallest colony, looms very large in courts of justice; and the suit which it brought against Massachusetts for a rectification—that is to say, an enlargement—of its boundary at the expense of its northern neighbor, fixed the jurisdiction of the court in the matter of controversies between States of the American Union. As the opinion of Mr. Justice Iredell is believed to state accurately the process by which the provinces became

States, so the opinion of Mr. Justice Baldwin accurately states the nature, origin, and unlimited extent of the clause of the Constitution by which the original thirteen States expressly and of their own free will consented to be sued.

Formal objection was made by Massachusetts through its counsel, no less a person than Daniel Webster, to the court's assumption of jurisdiction in the controversy which had troubled the relations of the two as colonies, and which was now troubling them as States. The jurisdiction of the court having been questioned, it was the duty of the court to decide the matter before taking up the case—indeed, the court *had* decided it, otherwise it would not have assumed jurisdiction in its earlier phases. I quote the opening lines of Mr. Justice Baldwin's opinion, inasmuch as it shows better than can any words of mine, the origin and nature of the quarrel of these two august persons of Constitutional law.

> At the January term of this Court, 1832, the plaintiff filed a bill in equity, presenting a case arising under the various charters from the crown of England to the Plymouth Company, in 1621; to Massachusetts in 1629; to Rhode Island in 1663; the new charter to Massachusetts in 1691; together with sundry intermediate proceedings of the council of Plymouth; the result of which was to vest in the colony of Massachusetts and the king, all the rights of propriety and government previously granted to that company as a political corporation. The bill also set out the repeal of the original charter of Massachusetts . . . the grant by the crown and acceptance by the colony, of a new charter, subsequent to the charter to Rhode Island.[22]

To come now to the opinion of Mr. Justice Baldwin. After saying that the Supreme Court is one of "limited and special original jurisdiction," and that its action must be confined "to the particular cases, controversies, and parties over which the constitution and laws have

[22] *State of Rhode Island and Providence Plantations, Complainants* v. *State of Massachusetts, Defendant,* 12 Peters, 657, 714 (1838).

authorized it to act," he announces the conclusion, that "any proceeding without the limits prescribed, is coram non judice, and its action a nullity."[23] The court must, therefore, decide, with or without protest of the parties, whether it does or does not have jurisdiction of the controversy. If it does not have jurisdiction, it must "surcease its action, or proceed extra-judicially."[24] Mr. Justice Baldwin therefore held that the court must inquire whether it could hear the controversy between the parties which were, in his own language, "two states of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes."[25]

It will be difficult, impossible, I believe, to find anywhere a more impressive statement of the manner in which the Supreme Court became invested with jurisdiction of controversies between States, than that of Mr. Justice Baldwin speaking for the Supreme Court itself. In the first sentence of this portion of the decision, he makes it clear that the States were the successors of the Crown, so that we are dealing with States sovereign except as to the powers of sovereignty which they have delegated to the United States as their agent. On this point, he says:

> Those states, in their highest sovereign capacity, in the convention of the people thereof; on whom, by the revolution, the prerogative of the crown, and the transcendent power of parliament devolved, in a plentitude unimpaired by any act, and controllable by no authority, . . . adopted the constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more states.[26]

[23] *Ibid.*, 720.
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*

To the consequences of this action, he next adverts: "The states waived their exemption from judicial power . . . as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant," he continues, "this Court had acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified."[27]

The next subject of his inquiry is whether the court has jurisdiction of the subject-matter of the suit, and a phrase will suffice from this portion of his opinion:

> That it is a controversy between two states, cannot be denied; and though the constitution does not, in terms, extend the judicial power to all controversies between two or more states, yet it in terms excludes none, whatever may be their nature or subject.[28]

This is more than an intimation that the power granted is without limitation unless inherent in the nature of things, as there is no word of limitation contained in the grant.

In a previous portion of the present lecture, I have referred to the statement of Chief Justice Marshall, and of other members of the Supreme Court, to the effect that it does not have jurisdiction of political questions. This is undoubtedly true in ordinary cases, but a question may at one time be political which becomes judicial by agreement of the parties. Indeed, if this were not so, there would be no hope for enlarging the domain of law at the expense of politics; for it may be said with slight, if any, exaggeration, that a great feature of modern development has been to withdraw from man arbitrary judgment in political matters, and to restrain the individual by a rule of law. This has been done by subjecting a political action

[27] 12 Peters, 720.
[28] *Ibid.*, p. 721.

to a rule of law; henceforth converting it into a legal, and therefore judicial, question, to the end—as the Massachusetts Constitution finely puts it—that government may be "of laws, and not of men."

Questions arising between nations are, and they are destined to remain, political unless there is some way of converting them into judicial questions; and an International Court of Justice can never produce the beneficent results which the partisans of judicial settlement are wont to claim, as the rôle of such a Court, in the midst of independent States, is limited to judicial questions. In the same manner, questions between States are in their nature political; for in the American Union the States are, as Mr. Justice Baldwin points out, foreign to each other for all except Federal purposes.

But States are not doomed to lead a treadmill existence; and political matters may become judicial questions. They have changed their nature by a single clause of the Constitution of the United States. How this has come about in the relations of the American States, and how it may come about between and among the nations at large, Mr. Justice Baldwin, still speaking for the court, announces in a passage of this very opinion, upon the application of which, to the nations at large, the development of judicial settlement depends. We must therefore let Mr. Justice Baldwin speak for himself and the court:

> The founders of our government could not but know, what has ever been and is familiar to every statesman and jurist, that all controversies between nations, are, in this sense, political, and not judicial, as none but the sovereign can settle them.[29]

This is a statement of a general nature, applicable to the world at large. He now restricts his argument to the States of the American Union:

[29] *Ibid.*, 736–737.

In the declaration of independence, the states assumed their equal station among the powers of the earth, and asserted, that they could of right do, what other independent states could do; "declare war, make peace, contract alliances"; of consequence, to settle their controversies with a foreign power, or among themselves, which no state, and no power could do for them. . . . They surrendered to congress, and its appointed Court, the right and power of settling their mutual controversies; thus making them judicial questions, whether they arose on "boundary, jurisdiction, or any other cause whatever."[30]

This is a statement which the learned Justice believed should be developed by way of example. Therefore, he continued:

There is neither the authority of law or reason for the position, that boundary between nations or states, is, in its nature, any more a political question, than any other subject on which they may contend. None can be settled without war or treaty, which is by political power; but under the old and new confederacy they could and can be settled by a court constituted by themselves, as their own substitutes, authorized to do that for states, which states alone could do before.[31]

From these statements, which are as premises in a syllogism, he reaches the inevitable conclusion—a conclusion which makes the jurisdiction of an international court of justice well-nigh coextensive with the good will of the nations. "We are thus pointed"—it is his own language I am quoting—"to the true boundary line between political and judicial power, and questions."[32]

Because of the importance of the views which he next proceeds to express on behalf of the court, I shall separate them, and make each the subject of comment. First, he contrasts the independent State and the court, "A sovereign decides by his own will, which is the supreme law within his own boundary."[33] This is, of course, the State of Constitutional law. He next takes up the court of the

[30] 12 Peters, 737.
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.*

State, similar in this respect to the court of a nation; "a court, or judge, decides according to the law prescribed by the sovereign power, and that law is the rule for judgment."[34] This is familiar doctrine in the constitutional State, in which courts exist with power to entertain suits against the sovereign power of the State. The next sentence goes to the heart of things, and applies the principles which he has developed, to the States as sovereigns, with the consequences flowing from the principles which he has established:

> The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case; . . . which depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them.[35]

The learned Justice does not leave the consequence to be drawn. He states it, and he states it in clear and unmistakable terms:

> From the time of such submission, the question ceases to be a political one to be decided by the sic volo, sic jubeo, of political power; it comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires.[36]

The meaning of this would seem to be that the agreement of sovereigns to submit to a court a question or controversy which heretofore has been arranged by negotiation, makes the question or controversy judicial. He contemplates that the law is in existence, or that there are principles, either expressed in a rule of law or from which the rule of law can be developed. The question is, however, made judicial by the agreement to submit it to a

[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*

court, although there is no rule of law in existence, and although the parties submitting the controversy may be unwilling that the judge be entrusted with the development of the rule of law.

The question being thus made judicial by submission to the court, the parties may agree upon the rule of law to be applied. It may be difficult, but it is possible; and it does not lie in the mouth of the English-speaking peoples to deny that it can be done, because under very dangerous circumstances—indeed under the very shadow and menace of a resort to arms—Great Britain and the United States submitted the so-called *Alabama Claims* to the Geneva Tribunal, agreeing that three rules, called the Rules of Washington, from the city in which the treaty was made, should be applied by the Tribunal in deciding the question, although Great Britain maintained, contrary to the contention of the United States, that the three rules were not included at the time in the law of nations respecting neutrality. The claims were decided satisfactorily, however, according to these rules. Great Britain and the United States had bound themselves by treaty to call the attention of the nations of the world to the rules, so that they might become part of international law and practice, and they have since become international law, if they were not international law at the time of their formulation.[37]

What two nations have done, all may do. Therefore, the nations may agree in an international conference to transfer from the domain of politics questions and controversies regarded at the time as political, and they may continue the process in successive international conferences, so that in the end there may be no international wrong without a remedy in an international court of justice of their own creation.

[37] Convention No. XIII, of the Second Hague Peace Conference concerning the Rights and Duties of Neutral Powers in Naval War, Articles 5, 6, 8.

Mr. Justice Baldwin was not content, however, with announcing the principle, although he did not seek to apply it on the large scale which I have ventured to outline. He dealt more in the concrete, saying:

> It has never been contended that prize courts of admiralty jurisdiction, or questions before them, are not strictly judicial; they decide on questions of war and peace, the law of nations, treaties, and the municipal laws of the capturing nation, by which alone they are constituted; a fortiori, if such courts were constituted by a solemn treaty between the state under whose authority the capture was made, and the state whose citizens or subjects suffer by the capture. All nations submit to the jurisdiction of such courts over their subjects, and hold their final decrees conclusive on rights of property.[38]

We have here a suggestion of a prize court, not of two nations, but of many nations, if they were willing to coöperate in its establishment, which they did, in the Second Peace Conference of The Hague. It has never been called into being, however, because of the failure of the nations to agree upon a satisfactory statement of the law which the court was to apply in its decisions. No doubt, the future will be more successful than the past.

The whole case for judicial settlement—the reason for its adoption and the way in which it may come about—is comprised in a further and final quotation which I feel constrained to make, from the opinion of this learned Justice, whose bust might properly adorn the Peace Palace of The Hague:

> These considerations lead to the definition of political and judicial power and questions; the former is that which a sovereign or state exerts by his or its own authority, as reprisal and confiscation; . . . the latter is that which is granted to a court or judicial tribunal. So of controversies between states; they are in their nature political, when the sovereign or state reserves to itself the right of deciding on it; makes it the "subject of a treaty, to be settled as between states independent," or "the foundation of representations from state to state." This is political

[38] 12 Peters, 737–738.

equity, to be adjudged by the parties themselves, as contradistinguished from judicial equity, administered by a court of justice, decreeing the equum et bonum of the case, let who or what be the parties before them.[39]

It is to be observed that when the Constitution of the American States went into operation on the 4th day of March, 1789, there was no law of the political body known as the United States of America. It had to be created, as the Government of the Union was a new organization. The Congress was authorized, within certain limits, to make this law. It has done so, and the law which the court administers is at hand. This, assuredly, is a precedent for the community of Nations, which may continue the process of the Hague Conferences in making from time to time the law which the court of the nations is to apply. The matter is of such importance in its relation to an international court, that it may be dwelt upon for a moment.

In *United States* v. *Hudson*,[40] the judges of the Circuit Court were divided on the question, "*whether the Circuit Court of the United States had a common law jurisdiction in cases of libel?*" An indictment had been made for "a libel on the President and Congress of the United States, contained in the *Connecticut Courrant*, of the 7th of May, 1806, charging them with having in secret voted $2,000,000 as a present to Bonaparte for leave to make a treaty with Spain." "The Court having taken time to consider," to quote the language of the original report, the following opinion was delivered (on the last day of the term, all the judges being present) by Johnson, J.

The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former,

[39] 12 Peters, 738.
[40] 7 Cranch, 32 (1812).

the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions—that power is to be exercised by Courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union.[41]

"It is not necessary," the learned Justice continued, "to inquire whether the general Government, in any and what extent, possesses the power of conferring on its Courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act."[42] The conclusion was, and it applies not only to the Union of American States, but to the members of the Community of Nations, that "The Legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."[43]

A Federal law has been created, and has grown up; the laws of the States exist; and international law is, as we shall see, regarded as a part of our municipal law. Therefore, Chief Justice Fuller was justified in saying in the case of the *State of Kansas* v. *State of Colorado*,[44] decided in 1902, that, "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand." Stated in terms applicable to an international court of justice, Chief Justice Fuller's language would be accurate, if slightly modified, to the effect that such a tribunal would, in the appropriate phases of the case submitted to it, apply a treaty binding the parties, the law of one or other of the litigating States, and that portion of international law resulting from usages and customs of the civilized nations.

In mentioning the law which the Supreme Court of the

[41] *Ibid.*, 33.
[42] *Ibid.*
[43] *Ibid.*, 34.
[44] 185 United States, 125, 146–147.

United States is to apply in suits between States, Chief Justice Fuller gives the place of honor to international law. This is the reason why I have dwelt with such insistence upon the international aspect of the American Union—why I traced, per Mr. Justice Iredell, the development from colony or province to State, and by a series of quotations sought to establish the fact that the Declaration of Independence was a declaration of independence of each of the States, and that they would have remained what they were—States, or rather, nations, of international law—had they not chosen to unite themselves by the bonds of law. The court which they established was therefore the court of States which at the time were free, sovereign, and independent of one another and of the world at large. They had taken the first step to divest themselves of their international trappings by renouncing the right which they possessed to negotiate directly and to conclude treaties with the nations then forming the Community of Nations. It was natural, therefore, that, in their interrelations, the Supreme Court of the United States should first mention as applicable to their disputes, international law, because they still possess the first requisite of international law, upon which all of its principles are based, and from which they are derived—equality toward one another, although they may treat with foreign nations only through the Government of their Union—an equality safeguarded by the Fifth Article of their Constitution to such an extent that it is to-day the only provision of the Constitution of the United States which can not be modified by amendment.

Let us consider first the extent to which international law is the law of the States, and therefore applicable in their disputes, and with a word or two, indicate how international law may be developed so that it may meet "the exigencies of the particular case."

SUITS BEFORE THE SUPREME COURT

Before the framing of the Constitution, international law had been applied in two very important cases. In that of *Nathan* v. *State of Virginia*[45] decided in 1781 in the Court of Common Pleas of Philadelphia, in the Commonwealth of Pennsylvania, it was held, according to the headnote, that "A State of the American Union under the Articles of Confederation is immune from suit as is a nation of the society of nations." In the course of the argument (for the case is almost all argument; the decision discharging without opinion the writ against the Commonwealth of Virginia), counsel for the plaintiff admitted that Virginia was a sovereign State, but insisted that it should not exempt its property in every case from the laws and jurisdiction of another State. The Attorney General of Pennsylvania, appearing for the Sheriff, and, indirectly for Virginia, put his case squarely upon the fact that Virginia was a sovereign State, and that all sovereigns are "in a state of equality and independence, exempt from each other's jurisdiction, and accountable to no power on earth, unless with their own consent."[46] The law of nations was, in his opinion, part of the common law of England, and therefore part of the law of Pennsylvania, which had accepted the common law in its entirety.

The second case also arose in Pennsylvania, although it was international in all its bearings. It turned upon the law of nations, and was decided according to its principles.[47] The Chevalier De Longchamps, an officer in the French Army which had so generously coöperated with us in the War of our Independence, was indicted because he threatened and menaced bodily harm to the person of one François Barbé-Marbois, at that time Consul General of France to the United States and Secretary of the French

[45] 1 Dallas, 77 note (1781).
[46] *Ibid.*, 78.
[47] *Respublica* v. *De Longchamps,* Court of Ayer and Terminer at Philadelphia (1784), 1 Dallas, 111.

Legation. The affair took place on the 17th of May, 1784, in the house of His Excellency, the French Minister Plenipotentiary, under, as the report of the case puts it, "the protection of the law of nations and this Commonwealth."[48]

Monsieur Barbé-Marbois, the victim of the threat and the menace, is known to American history, in that it was with him that Robert R. Livingston, our Minister to France, negotiated the purchase of Louisiana.

But to return to the case. Two days later De Longchamps ran across Monsieur Barbé-Marbois "in the public street &c . . . under the protection of the laws of nations, and in the peace of this Commonwealth." The belligerent Chevalier was unable to resist the opportunity of making an assault upon the peaceful Barbé-Marbois, "violently . . . &c. in violation of the laws of nations, against the peace and dignity of the *United States* and of the Commonwealth of *Pennsylvania*."[49] The defendant pleaded not guilty, but the jury found him guilty, the reason being that his action was an infraction of the law of nations, which, Chief Justice McKean said in sentencing him to fine and imprisonment, "in its full extent, is part of the law of this State." It is not immaterial to quote the concluding portion of the phrase, in which the learned Chief Justice stated that the law of nations "is to be collected from the *practice* of different Nations, and the *authority of writers*."[50]

These two cases, it is to be borne in mind, were decided before the adoption of the Constitution; from which it appears that, before that instrument authorized Congress to punish offenses against the law of nations, that body of laws derived "from the *practice* of different Nations, and the *authority of writers*" was officially declared to be a

[48] 1 Dallas, 111.
[49] *Ibid.*
[50] *Ibid.*, 116.

part of the common law of England and therefore to be a part of the common law of each of the United States.

The Government of the United States can, of course, pass a statute inconsistent with the law of nations, which will bind all persons within the jurisdiction of the United States, and be executed by all officials of the United States; but, powerful as we are at home, we are powerless abroad. Our laws have no extraterritorial effect; and the law of nations exists, notwithstanding our statute, and is the measure of the rights of nations against us, as well as the measure of our duty toward them. Despite our action, the obligation would exist to be enforced through diplomatic channels, although it might not be enforceable in the courts of the United States.

One case, and only one, need be given under the Constitution. It arose out of the Spanish-American War.[51] Two fishing smacks, the *Paquete Habana* and the *Lola*, were taken in Cuban waters, brought into Key West, and condemned as lawful prize. The owners of the vessels insisted that small craft engaged in fishing off the coasts were exempt from capture under the law of nations. Upon appeal to the Supreme Court, this view prevailed; the judgment of the lower court was reversed, and the money received for the vessels—which had been sold in the meantime—was returned to the claimants. In what has become well-nigh a classic opinion, Mr. Justice Gray, speaking for the court, said:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.[52]

He did not stop here. He proceeded to enumerate the

[51] *The Paquete Habana. The Lola,* 175 United States, 677 (1900).
[52] *Ibid.,* 700.

sources of the law and the evidence by which it is established:

> For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[53]

The trouble is that, being the result of usage and practice, the law changes according to usage and practice; different conditions giving rise to different usages and practice. It would be highly desirable in the interest of the nations themselves, and assuredly in the interest of an international court of justice, that the present law of nations be codified, in order that it might be so clear and certain that no country should have a pretext for refusing to abide by its principles, and that the international court, in seeking to apply it, should not be accused of usurping legislative functions, by making the law which it claims to apply. Codification is important for still another reason. Questions which are now political become, as Mr. Justice Baldwin has said, judicial by agreement of the nations to submit them to a court of justice. This court of justice, to produce the result which is expected of it—the settlement of controversies according to law—must have a law to apply. If the Hague Conferences should have successors either at The Hague or elsewhere, and if the nations would resume their labors interrupted by the World War, large sections of the political world could be transferred to the domain of jurisprudence, and for every wrong there would be a remedy—for every dispute, a court. When there are treaties covering questions in dispute; when there

[53] 175 United States, 700.

are laws of the conflicting countries; when the principles of international law are at hand, an international court will be able to render to the nations the services which the Supreme Court of these United States renders to the members of the American Union.

It will be observed that the Supreme Court has, by the consent of the States, original jurisdiction in controversies between them. It was supposed at one time that the judicial power of the Supreme Court extended to a suit brought by a citizen of one of the States against another State of the Union.

The judicial power of the United States extends to "Controversies between two or more States; between a State and Citizens of another State," and it might seem, according to the letter of the law, that the States had consented to be sued not only by States of the Union but by citizens of another State. If regard was had to the spirit of the law, it would indeed seem strange that a citizen of another State was accorded a greater right than that possessed by a citizen against the State of his residence.

In the 81st number of *The Federalist*, Alexander Hamilton had met and overcome this objection to the ratification of the Constitution by formally denying the right to sue a State by its own or other citizen without its express consent. In speaking of actions brought by citizens to recover debts which seemed likely if the State could be sued by citizens of another State, Hamilton said:

> The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a preëxisting right of the State governments, a power which

would involve such a consequence would be altogether forced and unwarrantable.[54]

This passage from *The Federalist* is quoted by Mr. Justice Bradley in behalf of the Supreme Court, in the case of *Hans* v. *State of Louisiana*,[55] decided against the right of the citizens to sue its State in a Court of the United States.

In the Virginia Convention fears of suit by individuals were expressed by no less personages than George Mason and Patrick Henry, and they were allayed by James Madison,[56] familiar with the Constitution in all its details, and by John Marshall,[57] soon to become and remain its chief accredited interpreter.

After quoting their views, Mr. Justice Bradley continues by way of comment: "It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion." [58] He admitted that "adhering to the mere letter," of the Constitution, suit might lie against a State, "and so,

[54] *The Federalist*, No. 81, Paul Leicester Ford's edition (1898), pp. 538, 546.

[55] 134 United States, 1, 13 (1889).

[56] "Its jurisdiction [the federal jurisdiction] in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts. . . . It appears to me that this [clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it." Elliot's Debates, vol. III (1891), p. 533.

[57] "With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. . . . But, say they, there will be partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. *Ibid.*, pp. 555–556.

[58] 134 United States, 14–15.

in fact, the Supreme Court held in *Chisholm* v. *Georgia;* but looking at the subject as Hamilton did," it is the language of the Court I am quoting, "and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right—as the people of the United States in their sovereign capacity subsequently decided." [59]

To recover a sum of money, Chisholm, a citizen of the State of South Carolina, had brought suit in the Supreme Court of the United States against the State of Georgia. That State did not deign to appear. The case was, however, entertained, elaborately argued, and decided in 1793 in favor of the plaintiff. Mr. Justice Blair, Mr. Justice Wilson, Mr. Justice Cushing, and Chief Justice Jay maintained the jurisdiction of the Supreme Court, against the opinion of Mr. Justice Iredell. For our purposes it is sufficient, without going into the facts, merely to quote the headnote of the case of *Chisholm* v. *Georgia*[60] already referred to, to the effect that, "A state may be sued, in the supreme court, by an individual citizen of another state. And in such suit judgment may be entered, in default of an appearance."

The commotion caused by the decision was widespread, insistent, and profound. Steps were immediately taken for an amendment of the Constitution which should prevent a recurrence of the incident; and the following Amendment was duly ratified, in a gradually growing series, by the States of the Union, and became the law of the land in 1798:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[61]

[59] *Ibid.*, pp. 13–14.
[60] 2 Dallas, 419 (1793).
[61] XIth Amendment to the Constitution.

I should like to repeat what I have said on more than one occasion—that the dissenting opinion of Mr. Justice Iredell was thus confirmed—as it is very material to the argument which I am endeavoring to make, that Mr. Justice Iredell's views be accepted as an impeccable authority.

The question arises—if, under the Amendment, a citizen is precluded from suing a State of the Union—whether a State may not, as the nation does in international law, espouse the claim of its citizen, and thus appear in his behalf before the Supreme Court, as nations are accustomed to appear before Mixed Commissions, Arbitral Tribunals, and will soon, it is to be hoped, appear in behalf of their citizens or subjects before a truly permanent court of international justice.

It would seem that a citizen of one of the American States can not do indirectly what he is forbidden expressly to do by the Eleventh Amendment, and that a State acting in behalf of its citizens would be circumventing the Amendment, in effect if not in form. This situation arose in the thoroughly discussed and hotly contested cases of *New Hampshire and New York* v. *Louisiana and Others*,[62] decided in 1883. The "Yankee" is proverbially shrewd, and he procured an act of the legislature of New Hampshire authorizing that State to bring suit in its own name for the recovery of claims against a State of the Union on a contract in writing, held by citizens of the State of New Hampshire. The Attorney-General was to appear for the citizens thus circumstanced, in a suit brought in the Supreme Court against the State of Louisiana. The expenses of the proceedings were to be defrayed by the citizens, who had made assignments of their claims to the State for the express purpose of suit, and the money collected was to be paid over to the holders of the certificates of indebtedness who had assigned their claims in accord-

[62] 108 United States, 76.

ance with the act. The decision negatives in express terms the claim of the State to make of itself a mere collection agency in behalf of its citizens. Chief Justice Waite, who delivered the unanimous opinion of the Court, had appeared as counsel for the United States in the *Alabama Claims* before the Geneva Tribunal; and the knowledge and ability which he displayed on that occasion had led to his appointment as successor to Chief Justice Chase. The case evidently interested him, as he examined it, not merely from the standpoint of constitutional law but also in the light of the law and the practice of nations. For these reasons, especially the latter, I lay before you a few extracts from his opinion. In the course of the argument, counsel contended that the State as "the sovereign and trustee of its citizens" was "clothed with the right and faculty of making an imperative demand upon another independent State for the payment of debts which it owes to citizens of the former."[63] Viewing the State as a nation of international law, the Chief Justice admitted the contention. "There is no doubt," he said, "but one nation may, if it sees fit, demand of another nation the payment of a debt owing by the latter to a citizen of the former. Such power is well recognized," he continues, "as an incident of national sovereignty, but it involves also the national powers of levying war and making treaties."[64] Then invoking the authority of *United States* v. *Diekelman*, 92 U. S., 520, 524, decided in 1875, he added, "if a sovereign assumes the responsibility of presenting the claims of one of his subjects against another sovereign, the prosecution will be 'as one nation proceeds against another, not by suit in the courts, as of right, but by diplomatic negotiation, or, if need be, by war.'" But the case is different with the State of constitutional law. "All the

[63] *Ibid.*, 89–90.
[64] *Ibid.*, 90.

rights of the States as independent nations were surrendered to the United States. The States are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty falls short of nationality. Their political status at home and abroad is that of States in the United States. They can make neither war nor peace without the consent of the national government. Neither can they, except with like consent, 'enter into any agreement or compact with another state.'"[65] Turning to the question in hand, the Chief Justice concluded:

> The evident purpose of the amendment, . . . was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens.[66]

It is to be observed, however, that the Court contemplated only the case of a State appearing in behalf of its citizens who were in law and in fact creditors of the debtor State.

It might, and indeed it would, have been different if the claims had been assigned outright to the State, although the creditor was actuated merely by the desire to secure collection of the outstanding indebtedness, inasmuch as the State in bringing suit would be acting in its own behalf and in its own interest, and no part of the money would pass to the original claimant, who had parted with his title. This was the state of affairs and this was the holding of the Supreme Court in the case of *South Dakota* v. *North Carolina*, 192 U. S., 286, decided in 1904.

The decision in each case was just, for the States consented only to be sued by States, and the Eleventh Amend-

[65] 108 United States, 90.
[66] *Ibid.*, 91.

ment by the obvious spirit, if not by the express letter, withdrew from the citizen the right to bring a State before the Supreme Court indirectly, when the right to do so directly had been denied. In this respect, the State of the American Union differs from the nation of the Society of Nations. The nation always has possessed, and doubtless will continue to possess, the power to appear in behalf of its citizens and subjects before an international tribunal. If this were not so, a nation would be unable to secure by judicial means redress for injuries to its citizens or subjects; and the temptation would be nearer at hand to resort to force when diplomacy failed to accomplish justice. The consent to suit before an international tribunal therefore implies the right of the nation to appear, not merely in its own behalf, but in that of its citizens or subjects.

"Case," "controversy," and "suit" are terms of constitutional law; and, while each may with equal propriety be used in international law, they are replaced in the law of nations by the single and generic word "claim." I shall close this lecture, which is already somewhat longer than it should be, by a definition of a "claim" of international law, the relation of the nation to the claim of its citizen or subject, and the services which the nations render in so doing. I shall invoke the authority of Mr. John Little, a highminded and very able citizen of our country, and umpire of the United States and Venezuelan Claims Commission of 1889–1890. Speaking for the Commission, he said, in the claim of Elizabeth B. Scott, against Venezuela, presented by the United States to the Commission:

> As we understand it, a "claim" within the meaning of the treaty implies a *right* on the one hand and an *obligation* on the other. It has reference to some alleged wrongful conduct of the government upon which it is made. That conduct may have been active or passive; the government may have done what it ought not to have done, or refused

or neglected to do what it ought to have done in respect to the subject-matter of the claim. And injury or damage must be alleged to have resulted from that conduct to the claimant under circumstances giving him the right under the treaty through his own government to demand, and imposing on the delinquent government the obligation to allow, indemnity therefor.[67]

Many questions of a general nature arose and had to be decided by the Commission before it passed to the consideration and decision of the special claims. These were grouped together and treated in a general opinion by the umpire on behalf of the Commission from which I make a final quotation:

In general, as we conceive, a claim of a citizen of one state upon another state, when taken up on his petition and diplomatically pressed for payment against the latter by the former, stands and is subject to be treated, for the purposes of prosecution, disposition, and settlement, as if owned by the plaintiff state. For these purposes, and in this sense, it ceases to be an individual, and becomes a national claim. Whatever settlement or mode of settlement it may agree to or adopt, binds him. Such is the implied understanding when he accepts the aid of his government (see *Diekelman* v. U. S., 92 U. S., 524). And the state's position, as it seems to us, is not merely of a representative character. It is essentially that of an interested party as well. Its interest is broader and deeper than a mere monetary one. It comprehends the general weal. The state, as a corporate existence, being an aggregation of individuals, is by common understanding, injured by injuring any of them. For his allegiance and services as a member of the community the citizen is entitled, as of right, while lawfully employed, to the return of the state's suitable protection against wrongs from without as well as from within its own confines. The observance of the obligation is fundamental and vital to government. Its violation involves a breach of trust disintegrating and destructive in tendency. Do away with its discharge, and government perishes. Impair the public confidence in that discharge by failure of duty in any instance, and the state suffers far beyond any possible injury to the citizen. Hence, in these controversies, the United

[67] *Elizabeth B. Scott* v. *The United States of Venezuela. United States and Venezuelan Claims Commission of 1889–1890,* Opinions of the Commissioners, 81. For an elaborate analysis of a claim and an enumeration of the different elements entering into it, see *Aspinwall* v. *Venezuela, Ibid.*, p. 297.

States Government is not a perfunctory party, but a real—in an important sense *the* real—party (on one side) in interest; not, of course, to secure the allowance of unjust claims—in the nature of things it cannot vouch for validity in advance—but to assist as it may in securing justice to its citizens, whatever that may be. In truth, if a remark aside may be indulged, the real underlying interests of the two governments in this respect are identical. For it is as much the concern of the one, in a true international sense, to do justice as it is of the other to have justice done. Therefore, all things whatsoever ye would that men should do to you, do ye even so to them, for this is the law and the prophets, is a doctrine, it may be taken, lying at the base of the convention itself.[68]

[68] *United States and Venezuelan Claims Commission, 1889–1890.* General Questions. Opinions delivered by the Commissioners in the Principal Cases. 9, 26–27.

V

SOVEREIGN STATES BEFORE THE SUPREME COURT OF THE UNITED STATES

OUR States of the American Union are ready to begin suit—a suit in their own behalf, not in behalf of their citizens. And, although it will probably be a boundary dispute which has led them to the Supreme Court, it is not necessarily so; for, as Mr. Justice Baldwin has said, there is in the nature of things no difference between a boundary suit and any other suit between States.

The States, however, are not there in person. They are bodies politic; they are creations of the law; they are artificial, if not always "ideal," persons. They can not act for themselves; for the will of the State is the collective will of its citizens expressed through agents, who, like citizens, are natural persons. The difference between the people making up the State and their agents is that the people act in their own behalf—the agents act in behalf of others. And, while the people make the law by which they restrain themselves, the officials are restrained by the law which the people make. The States, therefore, can not be brought into court by themselves; they can not even be "helped" in, as they are fixed in their locality, as well as in their minds. But their agents appear, and speak, and act, for them.

The first step to be taken is a motion made in the Supreme Court by the agent of the State bringing suit, for leave to file its bill against the State with which it is in controversy. This is a purely formal motion, yet the august defendant is not to be forced to litigate unless it

should appear that the bill brought by a State is in reality against a State. Therefore, the court, upon the motion made, fixes a date for its hearing; and, in the meantime, the defendant State is notified to appear and to show cause why the motion should not prevail. The leave is granted as of course.

New York[1] was the first of the States to make its appearance before the Supreme Court by a bill in equity, the opening lines of the official report being, "'The State of *New-York*, one of the *United States* of *America*, by *Josiah Ogden Hoffman*, the attorney-general of the said state' filed this bill. . . ." New York, be it noted, appeared by its Attorney-General—an eminently appropriate person; but any other attorney or counselor-at-law duly authorized by the State could have appeared in its behalf. The State of Connecticut did not appear; and, for our purpose, the question is whether the notice of suit given by New York was sufficient in that the Act of Congress in point provided that no writ of injunction should be granted, in any case, "without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same."

The facts of the case were simple, and involved title to a tract of land claimed by Connecticut and by New York. Each State had made grants of the land involved to its citizens; and the grantees of Connecticut had brought suit in the Circuit Court for the District of Connecticut to eject the grantees of New York who were in possession of the tract in dispute. A motion had been made to remove the suit from the Circuit Court to the Supreme Court of the States. This motion had been denied; and New York, alleging title to the land, filed its bill in the Supreme Court against Connecticut. To quote the exact words of the report, "the plaintiffs [the grantees of Connecticut]

[1] *State of New York* v. *State of Connecticut et al.*, 4 Dallas, 1 (1799).

in those suits were made defendants to the present bill; and the complainant [New York], after setting forth the title of *New York* to the lands in question, prayed *(inter alia)* for an injunction against them." As the suits had been brought in Connecticut to eject persons in possession of lands claimed by that State, the bill filed by the State of New York contained an historical account of its title to the soil and jurisdiction of the land in dispute, setting forth an agreement of November 28, 1683, between the two colonies on the subject, and prayed in accordance with Chancery practice for a discovery, for relief, and an injunction to stay proceedings in the Connecticut ejectments.

The decision in the first phase, by Chief Justice Ellsworth, was to the effect that writs of injunction would not be granted without reasonable notice to the adverse party or his attorney, and that in the absence of a general rule of court, the particular circumstances of each case would have to be regarded. The court found, however, that the notice which had been given was sufficient.

There was a decision also in the second phase of the case. It is very short—a mere decree of the court, instead of an opinion by one of its judges—to the effect that the injunction should not issue, inasmuch as New York was not a party to the suits brought in the court below; and for the further reason — fundamental in suits between States—"nor interested in the decision of those suits."[2]

In the third phase of the case, a question was bruited, but not decided. It is, however, interesting. As Connecticut had not appeared, counsel for New York moved that the State should appear on the first day of the next term, or that New York, as the plaintiff, would be at liberty to proceed *ex parte*, in the absence of the other party. A subpoena—that is, a summons—issued in a suit of equity requires that it shall be served sixty days before its return.

[2] *Ibid.*, 6.

Inasmuch as this had not been done in the present case, an alias, that is, another subpoena, was awarded, and the motion was made that Connecticut should appear, or that the plaintiff should proceed *ex parte*.

Stripped of technicalities, the case was clear. There was a controversy between the two States as to their common boundaries, for the determination of which resort should have been had to the original jurisdiction of the Supreme Court. It is true that the claim of each State to title in its sovereign capacity lay at the root of the controversy; but the Court properly refused to pass upon this delicate question in a suit between private parties in which the matter arose indirectly, when the remedy was at hand in which the ultimate question could be litigated directly between Connecticut and New York, which were in fact the real parties in interest.

From the reports of the case, it appears that the judges not only put questions to counsel and expressed opinions from the bench during argument, but that they also engaged in a running colloquy among themselves. As this is the first instance in the books of a suit between two States, it is perhaps of more than passing interest to quote a passage at arms between the members of the Court:

> Washington, *Justice*. Does the bill state, that the plaintiff is ignorant of the defendant's title?
>
> *Hoffman*. Yes, expressly.
>
> Washington, *Justice*. Then you are aware, that if the injunction should be granted upon that ground, it must, of course, be dissolved, as soon as the discovery is obtained. . . .
>
> Ellsworth, *Chief Justice*. If the bill contains no averment of a right of soil in *New York*, I think it must be defective, and lays no foundation for an injunction. To have the benefit of the agreement between the states, the defendants below (who are the settlers of *New York*) must apply to a court of equity as well as the state herself; but, in no case, can a specific performance be decreed, unless there is a substantial right of soil, not a mere political jurisdiction, to be protected and enforced.

Besides, is not the bill, likewise, defective for want of making the defendants below parties to it?

Chase, *Justice*. The validity of the grant of either state must depend upon the question of boundary; for, neither *New York*, nor *Connecticut*, could grant land, which it did not own. Hence, I think, the question of boundary must necessarily arise in the suits below.

Patterson, *Justice*. On the question just proposed by the Chief Justice, it may be remarked, that some difficulty would occur in sustaining a bill in this court, at the suit of the defendants below. But it does not appear to me, that any of the cases in the books apply to the present case. What does the bill present? A case of disputed boundaries between two states; and the question of soil, on their conflicting grants, must be decided by the question of jurisdiction. The state of *Connecticut* has granted out the *Gore*. The State of *New-York* has, also, granted out the *Gore*. The grantees of *Connecticut* have brought suits in *Connecticut* against the grantees of *New-York*, and will obtain possession of the land. If the grantees of *New-York* are thus evicted, they will bring suits in *New-York*, and, on their possession. But where will this feud and litigation end? It is difficult and painful to conjecture, unless this Court can, under the constitution, lay hold of the case to decide the question of boundary, which will be a decision of all the appendages and consequences.[3]

It will be observed that the names of Justices Cushing and Iredell are lacking. Their views would have added interest to the meagre report; but, in a note to the case, the reporter informs us that they were prevented "by indisposition" from taking their seats on the Bench. During the term and of his indisposition, Iredell, the greatest of the early judges, was to die.

Without precedents, the Court wisely determined that the circumstances of each case would have to be considered; indeed, nothing is more noticeable than the tentative, one might almost say timorous, way in which the judges proceeded in the early suits between States. They felt that they were trying not only a case, but also a great experiment; and, as they had lived throughout the Revolution and the critical period following it, and recalled

[3] 4 Dallas, 3–4, notes.

the immense difficulty with which the States had been persuaded to renounce the exercise of some of their sovereign powers to the government of the Union, they were naturally anxious to refrain from any action which might seem to question the sovereignty of the States and to put them upon an equality with private litigants. If the rules of private practice were to obtain, there could be little doubt what the opinion of the world would have been. In the Chisholm case, Georgia, against which suit was brought, did not deign to appear, although summons was issued and served upon its Governor and Attorney-General; and, in its absence, a judgment was rendered against it with loss to the Court of that prestige upon which its usefulness so largely depends.

In these three phases of the first of the reported suits of States in the Supreme Court, we are in the presence of certain very fundamental rules. On the surface of the record, it was a suit between States. In the first place, New York appeared by counsel and was, therefore, before the court. In the next place, New York was not a party in interest as the case was stated, and therefore was not entitled to the injunction for which it had asked. In the third place, the court insisted, and rightly, upon the elementary rule that proper notice should be given to the State sought to be brought before the court, and that because of failure to do this, a new summons should issue. The right of the complainant State to continue *ex parte*, that is, in the absence of the defendant lawfully summoned, it was not necessary to decide.

An interval of thirty years passed without a resort of State against State to the Supreme Court. The next, also, was a boundary dispute, that of *New Jersey* v. *New York*, in 1830.[4] When complainant, New York had been very eager to have the defendant State, Connecticut, haled

[4] 3 Peters, 461.

before the court. As defendant, it was not so eager, but objected, as it had the right to do, that service had been made only upon its Governor, whereas it should have been made upon both the Governor and the Attorney-General. The court held that a new subpoena should issue, as the rule required service to be made upon both, giving the full period of sixty days before its return. No counsel appeared for New York, as no counsel had appeared for Connecticut, or, indeed, in the Chisholm case sued at the interest of an individual. On behalf of the court, Chief Justice Marshall permitted the further subpoena to be issued without argument on the part of counsel for New Jersey.

In the early days, the States were inclined to stand upon their sovereign dignity. More than two months passed and the defendant had put in no appearance. New York was obdurate. The question before the court, therefore, was whether a State duly served with notice of a suit could block the case of the complainant State ready to proceed and with its counsel in court. The question did not arise at this stage of the proceedings whether the defendant State could be compelled to appear. The plaintiff requested permission to proceed with the case *ex parte;* and this permission was granted in an opinion of the court delivered by Chief Justice Marshall. There was, he said, in the second of the three phases of the case, no act of Congress prescribing the mode of proceeding against States, and there was no act of Congress regulating the matter in which the Supreme Court should exercise its original jurisdiction. The Judiciary Act of 1789 invested the Federal Courts with the power to make and establish rules which should be necessary for the ordinary dispatch of business.[4A] Acts

[4A] See Charles Warren, "New Light on the History of the Federal Judiciary Act of 1789," *Harvard Law Review,* vol. XXXVII (November, 1923), pp. 49–132. Mr. Warren has been able to establish the authorship of the Federal Judiciary Act, ascribing it to Oliver Ellsworth. It is impossible to mention Mr. Warren's name

of Congress, however, had regulated the issuance of process, and Chief Justice Marshall followed the precedents in the cases which had applied these writs and processes in suits of individuals against States before the passage of the Eleventh Amendment. Therefore, on this occasion, in order that the State with a right should not be without a remedy, the court had decided, he said, to issue the following general orders:

1. Ordered, that when process at common law or in equity shall issue against a state, the same shall be served upon the governor or chief executive magistrate, and the attorney general of such state.

2. Ordered, that the process of subpoena issuing out of this court in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and farther, that if the defendant, on such service of the subpoena, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.[5]

The determination of the complainant, as so often happens, broke down the resistance of the defendant. The Attorney-General of New York filed a demurrer to the bill of New Jersey which, admitting the facts, denied that they constitute a cause of action as stated. The two parties were before the Court; and, as often happens, they agreed to compromise the case out of court. They did so in this case, and further proceedings were discontinued.

As indicating the cautious manner in which the court felt its way step by step in the cases before it, Chief Justice Marshall had said in the previous phase of the case, allowing the complainant to continue *ex parte:* "as no final decree has been pronounced or judgment rendered in any suit heretofore instituted in this court against a state; the question of proceeding to a final decree will be

even in a foot-note, without an expression of gratitude which believers in the Supreme Court owe him for his masterly work, *The Supreme Court in United States History*, 3 vols. (1922).

[5] 5 Peters, 284 (1831), 289–290.

considered as not conclusively settled, until the cause shall come on to be heard in chief."[6]

But already the case of *Rhode Island* v. *Massachusetts*, the first in which a final judgment was to be rendered, was discernible on the horizon. It was a boundary case, and in 1833, at the request of counsel for Rhode Island, a subpoena was awarded and process issued by the Supreme Court against the Commonwealth of Massachusetts. Judicial settlement was to be tested and the procedure appropriate to suits between States was to be determined step by step, up to and including a judgment—not against Massachusetts, as Rhode Island had hoped, but in favor of the defendant.[7]

We are now met by a matter of courtesy rather than of law in the contest between the two States.[8] Senior counsel for Rhode Island was prevented by unexpected and severe illness from attending the court at the time set for argument. In his absence, the Attorney-General of the State applied for a continuance. Massachusetts was on hand by its Attorney-General, who opposed the motion for continuance. Lawyers are not discourteous, although they may seem to be so at times; they are merely vigilant for the interests of their clients, and unwilling by an act of seeming courtesy to prejudice a valuable right. The motion, however, was granted.

The next phase, and assuredly the greatest of the eight phases to which this litigation gave rise before it was finally settled, was decided in 1838. It is the one in which Mr. Justice Baldwin, speaking for his brethren, intimating that there was no difference between a boundary and other disputes, held that the Supreme Court had jurisdiction of a dispute concerning boundaries; and ex-

[6] *Ibid.*, 291.

[7] 7 Peters, 651 (1833).

[8] 11 Peters, 226 (1837).

plained the process by which a question originally political would become judicial by the mere agreement of the parties to submit it to a court to be decided by the law found by the judges to be applicable, and acting under a sense of judicial responsibility.

From the date of rendering this judgment, in 1838, the conditions of judicial settlement and its vast possibilities have been before the world; and the opinion of Mr. Justice Baldwin is as a text to the partisans of judicial settlement. It is not for me to attempt to state its relations to other judgments of the court on other points of law; but I believe I may say—having read, so far as I can ascertain, all of the cases involving suits against States to be found in the reports of the Supreme Court—that the opinion of Mr. Justice Baldwin in this phase of the case of *Rhode Island* v. *Massachusetts* is the most masterly, broad-minded, and convincing document on the subject to be found in the books. This decision held that the court had jurisdiction; and Massachusetts was put in the position of deciding whether it would continue the case or withdraw from it. But the right of withdrawing, if it existed, was an empty one, because, the court having jurisdiction, and the plaintiff wishing to continue, the latter, according to the practice of the court, would be permitted to continue *ex parte*. Massachusetts elected to withdraw its appearance, and made a motion to that effect. Naturally, Rhode Island opposed the motion; but, after argument, it was granted by the court. This, of course, involved the power of the Supreme Court to compel an appearance of the defendant State, properly summoned in a case of which the court had jurisdiction. It was and is a question of grave importance. The court considered it to be such, and examined very carefully the precedents of suit between States either at the instance of individuals or of States. The conclusion was expressed

briefly but pointedly by Mr. Justice Thompson. "The practice," he said, "seems to be well settled, that in suits against a state, if the state shall refuse or neglect to appear, upon due service of process, no coercive measures will be taken to compel appearance; but the complainant, or plaintiff, will be allowed to proceed *ex parte*."[9] Applying this doctrine to the case in hand, he added: "If, upon this view of the case, the counsel for the state of Massachusetts shall elect to withdraw the appearance heretofore entered, leave will accordingly be given; and the state of Rhode Island may proceed *ex parte*."[10]

The court found itself in troubled seas, and felt it well to have an anchor to the windward. Therefore, in granting the right of Massachusetts to withdraw, it sought to persuade that State to refrain from the exercise of its right, and, so far as in it lay, to have the litigants take a new start, as it were. "If the appearance is not withdrawn," Mr. Justice Thompson continued, "as no testimony has been taken, we shall allow the parties to withdraw or amend the pleadings; under such order as the Court shall hereafter make."[11]

The result so far is, that a State could, at least in a boundary dispute, summon a State to the Bar of the Supreme Court; that the case might continue in its absence if it failed to appear; and that if it did appear, and then subsequently withdrew, the case might likewise continue in its absence.

Under these circumstances, it could be predicted with reasonable certainty what a wary defendant would do. A judgment was to be rendered in any event, and the chances were that the decision would be more in favor of the State if it appeared than if it allowed the case to proceed and

[9] 12 Peters, 761.
[10] *Ibid.*
[11] *Ibid.*

judgment be entered in default of its appearance. Apparently, the meaning of the court's decision was plain to both litigants. Rhode Island, therefore, requested permission to amend its bill, and leave was given in the January term of 1838. The amended bill was filed, and Massachusetts was allowed until the term of 1840 to answer. Rhode Island was the actor in the proceedings. It proceeded alone in the next phase of the controversy. Massachusetts was not officially represented, although Daniel Webster was on hand to look after its interests. He was not, he said, authorized to appear for Massachusetts. Its legislature had not met, and the action to be taken had not been decided upon. The Attorney-General of the State had not thought it proper to act on his own initiative. "The movements of such bodies," Mr. Webster said, "as the defendants in this case, are slow"—proverbially slow, he might have added.[12]

The court appeared to be impressed by Mr. Webster's observations—it always appeared to be impressed by Mr. Webster. Everybody was. In the great case of Dartmouth College which Mr. Webster had tried many years before, Chief Justice Marshall broke into tears as Webster, a graduate of the college, said, "It is, Sir, as I have said, a small College, and yet *there are those who love it*——."[13] But on this occasion, Chief Justice Taney, who had hitherto taken no part in the case other than to dissent to the jurisdiction of the court, delivered its opinion. He had been Attorney-General of Maryland and of the United States; he had also been Secretary of the Treasury. He knew from experience that such bodies are slow. Like his illustrious predecessor, he decided in favor of the great Daniel, although the case was not one calling for tears. His opinion

[12] 13 Peters, 23.

[13] *Trustees of Dartmouth College* v. *Woodward*, 4 Wheaton, 517 (1819); see, Albert J. Beveridge, *The Life of John Marshall*, vol. IV (1919), pp. 220–281.

is short and to the point, and it deserves quotation, as it looks at the question involved from the large and broad aspect of a man who had had experience in public affairs, and who recognized that, while the rules governing individuals may apply in principle to States, it should not be the case of the letter killing the spirit. This is what he said:

> From the character of the parties, and the nature of the controversy, we cannot, without committing great injustice, apply to this case the rules as to time, which govern Courts of Equity in suits between individuals. In the last mentioned cases, the material allegations in the bill are comparatively few in number, and rest in the personal knowledge of the individual who is to put in his answer. But [in] a case like this, and one too of so many years standing, the parties, in the nature of things, must be incapable of acting with the promptness of an individual. Agents must be employed, and much time may be required to search for historical documents, and to arrange and collate them, for the purpose of presenting to the Court the true grounds of the defense.[14]

The observations of the Chief Justice were indeed apposite, and they apply with even greater effect to suits between nations in an international court of justice, where countries of different origins, of different languages, of different institutions are arrayed against one another in earnest although peaceful contest.

Massachusetts was therefore allowed to decide whether it would elect to withdraw wholly from the case, or to answer in 1840 the amended bill of Rhode Island, with the understanding that if Massachusetts should withdraw within the given period, Rhode Island should be at liberty to proceed *ex parte*. As was to be expected, Massachusetts elected to contest the case. Rhode Island presented an amended bill; and, to this bill, Massachusetts presented a plea and an answer.

Massachusetts, however, was in a frame of mind to stand upon its strict rights in the premises, and to take

[14] 13 Peters, 24.

advantage of the technicalities of Chancery pleading and practice.[15] Without entering into technicalities, it may be said that Rhode Island found itself embarrassed. If it admitted the plea to be good in form and set it down for argument, it admitted the truth of the facts pleaded, and the decision would be on the facts as stated in the plea, irrespective of the allegation contained in Rhode Island's bill. If, on the other hand, Rhode Island replied to the plea and denied the truth of the facts which it contained, then, upon the proof of these facts, the bill of the complainant would be dismissed without reference to any of the allegations contained in the bill, which, if true, might entitle the complainant to recovery. This technical rule of pleading often narrowed the issue so that injustice was done in suits between individuals, and courts of equity were in the habit of exercising their discretion in such a way as to prevent the defendant from profiting by the plea, when to do so would result in injustice.

Chief Justice Taney, who is considered by many competent persons to be the most technical of our past judges, followed the broad and liberal course of the previous case, holding that it would be manifestly unjust in a case between two States of the American Union to apply the technicalities of Chancery pleading in such a way as to prejudice the interests of either. If the technical rules of pleading were, he said in effect, observed in their rigidity, Rhode Island would be unable to get its whole case before the court in such a way as to have a judgment upon its merits. On the other hand, a failure to allow the defendant the benefit of the defense contained in the plea would prejudice its interests. The whole purpose of common law and equity pleading is to reduce the controversy to a single point affirmed on one side and denied by the other. Here the plea was "multifarious," to use a technical term, in

[15] *Rhode Island* v. *Massachusetts*, 14 Peters, 210 (1840).

that it contained two separate and distinct defenses, either one of which would tend to defeat the complainant's action. One flowed from the agreements and compromises of more than a century ago, called in law "an accord and compromise of a disputed right"; the other was that during this century and more, Massachusetts had occupied the territory in dispute as a sovereign State. This is, in legal language, "prescription," or an unmolested possession from the time of the agreement. The court therefore overruled the plea as multifarious. This was not doing any injustice, because Massachusetts could bring the whole subject to a hearing by a demurrer to the bill of Rhode Island, instead of permitting only that part which was favorable to its contention, as set forth in the plea to be passed upon, to the prejudice of Rhode Island's other claims. By overruling the plea, the whole case would be opened and Massachusetts would be at liberty to demur or to answer as it might seem to be in its best interests.[16]

In the interest of the case, of the court, and of the American experiment of settling disputes between States of the Federal Union by due process of law—a process and a law applicable to the bodies politic of the community of nations—I lay before you two small portions of Chief Justice Taney's opinion delivered in behalf of the court itself:

> In a controversy where two sovereign states are contesting the boundary between them, it will be the duty of the Court to mould the rules of Chancery practice and pleading, in such a manner as to bring this case to a final hearing on its real merits. It is too important in its character, and

[16] "The modes of making defence to a bill in equity are said to be by *demurrer*, which demands of the court whether from the matter apparent from the bill the defendant shall answer at all; by *plea*, which resting on the foundation of a new matter offered, demands whether the defendant shall answer further; by *answer*, which responds generally to the charges of the bill; by *disclaimer*, which denies any interest in the matters in question; Mitf., *Eq. Pl.*, Jer. ed., 13; *Ocean Ins. Co.* v. *Fields*, 2 Sto. 59, Fed. Cas. No. 10,406; Story, *Eq. Pl.*, §437." *Bouvier's Law Dictionary*, 3rd revision (1914), vol. III, p. 2597.

the interests concerned too great, to be decided upon the mere technical principles of Chancery pleading.[17]

And after a discussion of the phases of the case which should be considered by the court, he announced his own and its decision:

> The course determined on recommends itself strongly to the Court, because it appears to be the only mode in which full justice can be done to both parties. Each will now be able to come to the final hearing, upon the real merits of their respective claims, unembarrassed by any technical rules. Such, unquestionably, is the attitude in which the parties ought to be placed in relation to each other. If the defendant supposes that the bill does not disclose a case which entitles Rhode Island to the relief she seeks; the whole subject can be brought to a hearing by a demurrer to the bill. If it is supposed that any facts are misconceived by the complainants, and therefore erroneously stated; the defendants can put these in issue by answering the bill. The whole case is open; and upon the rule to answer which the Court will lay upon the defendant, Massachusetts is entirely at liberty to demur or answer, as she may deem best for her own interests.[18]

The decision in this case is very important, going as it does to the heart of things, showing that States could safely entrust their interests to the Supreme Court, watchful of each, without prejudice to either, in order that justice should be done upon the merits of the controversy as they should be disclosed in the pleadings.

Here again, the procedure adopted in this case is that which should be followed in an international tribunal; and this is only another of the instances in which an international court can profit by the decisions of the Supreme Court of these United States.

Within the time prescribed by the court, Massachusetts filed a demurrer to the complainant's bill. Rhode Island had alleged mistake, in that the boundary line had been run seven miles south, whereas, according to the Charter of Massachusetts granted by Charles I in 1628, the south-

[17] 14 Peters, 257.
[18] *Ibid.*, 262.

ern boundary line of that province, and therefore, the northern boundary line of Rhode Island by its Charter from Charles II in 1663, should have been drawn "three English myles on the south parte of the rivir called Charles rivir, or of any or every parte thereof."[19] In 1841,[20] the case was therefore again before the court, on demurrer, which has the effect in law of admitting the facts stated in the complainant's bill to be true; but, admitting them to be such, the complainant is without a principle of law permitting a recovery or a judgment in its behalf. If the facts alleged by Rhode Island were taken to be true, and there was no way of gainsaying them, judgment would necessarily follow, as the line was actually seven instead of three miles to the south, as called for by the Charter of Massachusetts. Fraud was not alleged; the trouble was due to a mistake first ascertained by Rhode Island a century and more later, in 1750 or thereabouts, after the very line in question had been drawn; and since this time, Rhode Island had earnestly requested Massachusetts, but without avail, to correct the mistake.

Relief against mistake is a recognized heading of relief in equity, and this was an equitable proceeding. To counteract the force of the admission of the truth of the facts made in filing its demurrer, Massachusetts maintained that it had from the very beginning not only claimed, but actually occupied the territory, and that by its occupation under a claim of right, it had acquired a title to the territory in dispute by prescription—that is to say, a title recognized in law by twenty years' adverse, continuous possession; and here the occupation had been for more than a century before the alleged discovery of the mistake.

Again the court disregarded technicalities. Siding with

[19] *Ibid.*, 237.
[20] 15 Peters, 233 (1841).

Cicero and Montesquieu—although not invoking their authority—the court held in effect that it could not apply to nations those principles of law in all their rigidity which were applicable to private litigants in a quarrel over a gutter. Chief Justice Taney—the Prince of technical lawyers—showed his broadness where broadness was in place, and moulded the rules of equity of which he was a consummate master, to meet the exigencies of a dispute between sovereign States. The allowance of the facts stated in the complainant's bill, admitted by the defendant's demurrer, might have been unjust to Massachusetts, because, subjected to proof, they might fail. On the other hand, the allowance of the doctrine of prescription applicable to a strip of land in dispute between mere individuals might be an injustice to Rhode Island, inasmuch as the evidence introduced might tend to excuse the great lapse of time and the apparent acquiescence. "We speak of the case as it appears," he said, "upon the pleadings. It may prove to be a very different one, hereafter, when the evidence on both sides is produced."[21] In regard to the Statute of Limitations, which imposes a bar at the expiration of twenty years, the Chief Justice said:

> But it would be impossible with any semblance of justice to adopt such a rule of limitation in the case before us. For here two political communities are concerned, who cannot act with the same promptness as individuals; the boundary in question was in a wild unsettled country, and the error not likely to be discovered, until the lands were granted by the respective colonies, and the settlements approached the disputed line; and the only tribunal that could relieve after the mistake was discovered, was on the other side of the Atlantic, and was not bound to hear the case and proceed to judgment, except when it suited its own convenience. The same reasons that prevent the bar of limitations, make it equally evident, that a possession so obtained, and held by Massachusetts, under such circumstances, cannot give a title by prescription.[22]

[21] 15 Peters, 271.
[22] *Ibid.*, 273.

The court therefore overruled the demurrer, and ordered the defendant to file an answer to the complainant's bill. The answer was duly filed, the case again argued by counsel, and a decision rendered in 1846—the first final decision in any suit between States—in the last phase of *Rhode Island* v. *Massachusetts*.

Mr. Justice McLean delivered the opinion of the court, as he himself said in his opening words, under "a due sense of the dignity of the parties, and of the importance of the principles which it involves." And he brought to the case the same broadness and openness of mind which characterized the opinion of every judge in the case, saying:

> More than two hundred years have elapsed since the emanation of the Massachusetts charter, calling for this boundary; and more than one hundred and eighty years, since the date of the Rhode Island charter. In looking at transactions so remote, we must, as far as practicable, view things as they were seen and understood at the time they transpired. There is no other test of truth and justice, which applies to the variable condition of all human concerns.[23]

Viewing the case from this standpoint, he first observes that the words of the Massachusetts Charter were not clear from doubt, and that intelligent and honest people might well differ as to their meaning. On this point he said:

> But who can maintain that a line to be run "three miles south of Charles River, or of any and every part thereof," is clearly limited to three miles south of the main channel of the river. Can the body of the river with more accuracy of language be called a part of it, than its tributary streams. . . . When we speak of a river, we speak of it as a whole, whether we refer to it above or below a certain point.[24]

In the opinion of the court, it seemed that the Charter could be construed in the sense in which Massachusetts claimed to understand it, and that the construction of the

[23] 4 Howard, 591, 629 (1846).
[24] *Ibid.*, 633.

complainant was not a forced one. Hence it was that the acts of the two colonies in regard to it should be scrutinized, as throwing light upon the meaning of words admittedly dubious. The mistake of Rhode Island was, according to its contention, first discovered on or about 1750; and, without tracing the various actions of the parties up to that date, the learned Justice added that, "a want of this knowledge, after the lapse of more than a century and a quarter, is difficult to establish."[25] The truth of the matter seems to be that the contention of Rhode Island was correct as to the meaning of the words in the Charter.

The King in Council had had occasion to consider the same situation, the only difference being that the dispute was between Connecticut and Massachusetts and that the line was to be drawn to the north, instead of to the south of a river. The Charter of Massachusetts described its northern boundary as "three English miles to the northward of the Merrimack River, or to the northward of any and every part thereof." The King in Council held the northern boundary to be a curved line three miles north of and following the sinuosities of the Merrimack River, to a given point, and thence due west. Connecticut was interested in the boundary line of the Charles River, which had given Rhode Island such concern. Connecticut had raised the question in its difference with Massachusetts, and in 1754 it consulted one William Murray, then Attorney-General, and afterward the great Lord Mansfield. His opinion was—and it is his language I quote—that:

> If the matter was open, the same construction already made in the case of Merrimack River must be put upon the same words in the same charter applied to Charles River.[26]

[25] 4 Howard, 635.
[26] *Ibid.*, 638.

He was of the opinion, however, that, "in settling the above-mentioned boundary, the crown will not disturb the settlement by the two provinces so long ago as 1713." This was only a period of 41 years.

Unfortunately for Rhode Island, Commissioners of the Colony had met before the final discovery of the mistake, with power to settle and to compromise the boundary which was in dispute between them. The question, therefore, was not that of a mere mistake, but the compromise of a doubtful claim, some forty years before the attempted repudiation of the line on the ground of mistake. "Surely this," to use the measured and majestic eloquence of Mr. Justice McLean, "connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary."[27]

There is one further phase of the question which we must consider: What is to be done with the judgment? Presumably it is to be executed by the parties, as it is not an idle proceeding in which they have been engaged. In this case, the judgment was in favor of Massachusetts, so that there was nothing to execute, as that State was already and had been for the past two hundred years in possession of the strip of land in controversy. But what is to be done, or rather what may be done, in the case of a judgment against a State that refuses to comply with its terms, or

[27] *Ibid.*, 639.

that takes no step in that direction? It is one thing to fail to appear and litigate; it is another thing to fail to execute a judgment that has been rendered in due course.

There was a judgment of the Supreme Court against a State in an early and interesting case.[28] Georgia both claimed and exercised jurisdiction over certain lands situated within its territory, although they belonged to the Cherokee Nation as such, and were, under the laws and treaties of the United States, excluded from the jurisdiction of the State. Nevertheless, Georgia passed laws and extended them to this territory. For the violation of these laws within the territory of the Cherokee Nation, one Worcester, a missionary to the Indians, was tried in a court of Georgia, convicted, and imprisoned. Worcester carried his case to the Supreme Court of the United States, which declared that the laws in question were unconstitutional and therefore null, void, and of no effect; that the courts of Georgia were without jurisdiction; that their proceedings were null and of no effect; and that Worcester, therefore, should be set at liberty. The fact is, however, that Georgia did not comply, and that the President of the United States did not execute the judgment. This was in 1832.

On the eve of the Civil War, a case arose which was to all intents and purposes a suit between States. The plaintiff was Kentucky; and, the suit being against William Dennison, then Governor of Ohio,[29] the court properly held that the suit against him in his official capacity was a suit against a State. The facts are simple; they are interesting; and they belong to a day that is past. One Willis Lago, a "free man of color," was indicted in the State of Kentucky in 1859, "for the crime" of seducing and enticing one Charlotte, a slave, to leave her owner and pos-

[28] *Worcester* v. *Georgia*, 6 Peters, 515.
[29] *Kentucky* v. *Dennison, Governor of Ohio*, 24 Howard, 66 (1860).

sessor. Kentucky was a slave State; and Ohio, a State in which slavery was forbidden. Therefore, the "free man of color" and the escaped slave crossed the Ohio River, separating the two States, seeking and finding refuge in the free State of Ohio. The act of the "free man of color" was in violation of "the peace and dignity of the Commonwealth of Kentucky," and a request for his extradition was made in due form by the Governor of Kentucky upon the Governor of Ohio, for the return of the fugitive from justice to the State of Kentucky. Governor Dennison refused.

As it was a suit between States, the Supreme Court had original jurisdiction of it; and a motion was duly made in the Supreme Court in behalf of the State of Kentucky for a writ of mandamus to compel the Governor of Ohio to deliver up and surrender the fugitive to the authorities of Kentucky. The Attorney-General appeared on behalf of the Governor of Ohio. The Supreme Court, in a unanimous opinion delivered by Chief Justice Taney in 1860, on the eve of the Civil War, held that, under the Constitution and an Act of Congress of 1793 regulating extradition, it was the duty of the Governor of Ohio to return the fugitive from justice to the authorities of Kentucky. The performance of this duty, however, was, the Chief Justice said, "left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the act of 1793."[30] The Chief Justice continued and concluded,

> But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him.[31]

[30] *Ibid.*, 109.
[31] *Ibid.*, 109–110.

Upon this ground, therefore, the motion for the mandamus was overruled. This, it would seem, is a clear statement to the effect that the Government of the United States does not possess the right to use coercive means to compel a State to comply with a judgment of the Supreme Court in the case of a suit of State against State.

Throughout the different phases of the litigation between Rhode Island and Massachusetts, the court repeatedly called attention to the fact that two sovereign States were at the bar of the court; and they evidently felt that in dealing with sovereign States they were dealing with litigants who had a temper and dignity different from that of individuals. Apparently they limited the general consent of the States to be sued as not including a consent to have the judgment executed against them by coercive means.

The question of execution came up in 1904 in the case of *South Dakota* v. *North Carolina*.[32] The question was not decided, however, as, in the opinion of the court, it was not involved. The State of South Dakota had obtained bonds of North Carolina, and brought suit in its own right for them against North Carolina, which had issued but not paid them. They were secured by shares of stock belonging to North Carolina; and the Supreme Court entered a decree for the amount due. Mr. Justice Brewer, speaking for the court, said:

> There is in this case a mortgage of property, and the sale of that property under a foreclosure may satisfy the plaintiff's claim. If that should be the result there would be no necessity for a personal judgment against the State. . . . Equity is satisfied by a decree for a foreclosure and sale of the mortgaged property, leaving the question of a judgment over for any deficiency, to be determined when, if ever, it arises.[33]

Fortunately, it was not necessary to sell the mortgaged

[32] 192 United States, 286.
[33] *Ibid.*, 321.

property in order to satisfy the claim of South Dakota, as the judgment for $27,400 was satisfied.

The question arose, however, in the ninth and last phase of the long-drawn-out and hotly contested suit of *Virginia* v. *West Virginia*,[34] and was decided as recently as 1918 in favor of the power of the United States to enforce a judgment in favor of one State against another State of the American Union.

The first controversy in which a final judgment was rendered against a State was between Rhode Island and Massachusetts, and consisted of eight phases. The controversy in which it was decided for the first time that a final judgment in behalf of a State could be executed against a State of the American Union, was between Virginia and West Virginia, and consisted of nine phases. These two controversies are very interesting to the lawyer, inasmuch as they practically begin and end the course of a suit of State against State, from the question of jurisdiction to the execution of judgment. It will not be necessary in the Virginia case to follow in detail the general phases of the controversy. For our purpose, it will suffice to state the considerations which led the court to the conclusion that the power of execution was inherent in judgment. But the original facts of the controversy are so interesting in themselves and the justness of the case of Virginia is so evident, as to cause us involuntarily to rejoice in a final decision in its favor, without perhaps noting as otherwise we might, the danger lurking in holding that a judgment can be executed against a State of the American Union.

The State of West Virginia is one of the permanent consequences of the Civil War. It is made up of the loyal counties of Virginia in the west, whence its name, which refused to follow the State of Virginia out of the Union

[34] 246 United States, 565 (1918).

—or rather, in its attempt to secede. Representatives of the loyal counties, calling themselves the "Restored State of Virginia," met in the city of Wheeling, within the loyal counties, on August 20, 1861, and passed an ordinance for the formation of a new State from the counties to the west of the mountains. In this ordinance, it was provided that the new State should assume "a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861."[35] A Constitution was formed, and approved by the Congress of the United States; and the new State of West Virginia was admitted into the Union on June 20, 1863. The 8th section of the 8th Article of this Constitution provided, in addition to the statement of the ordinance, that the legislature should ascertain as soon as practicable the equitable proportion of the public debt thus assumed. It is, however, one thing to promise and another thing to pay. During the period of forty years, from 1865 to 1905, the Commonwealth of Virginia vainly tried to obtain from its former counties, united under the name of West Virginia, an equitable proportion of the public debt of the undivided State, to quote the language of Mr. Justice Fuller, in this phase of the case, "proper to be borne and paid by West Virginia."[36] Suit was therefore brought to obtain through law what could not be obtained by ordinary negotiation.

After ten years of litigation, judgment was entered in favor of Virginia, in the seventh phase of the case, for $12,393,929.50, with interest at 5 per cent on the total amount awarded from the entry of the decree until its satisfaction.

Still West Virginia, carved out of the Commonwealth of Virginia, that "Mother of Empires," as Mr. Justice Field once called it from the bench of the Supreme Court,

[35] *Virginia* v. *West Virginia*, 206 United States, 294.
[36] *Ibid.*, 317.

refused to pay, although it promised to do so and had assuredly received an ample consideration for the amount involved, in its separation and establishment as a State of the Union. The court showed the forbearance due to a State in refusing to press for immediate payment. Virginia, however, sought a writ of mandamus from the Supreme Court directed to the State of West Virginia and the members of the legislature, "requiring them to show cause why the writ should not issue, commanding the levy of a tax to satisfy the judgment heretofore recovered by Virginia."[37] This was in 1917, and in the decision to which this final phase of the case gave rise, the Supreme Court held, for reasons which to the judges seemed sufficient, that the government of the United States, through its various agencies, possessed the power to compel the execution of the judgment, although in so holding, it did not proceed to specify the means by which the execution could be had, in the belief that West Virginia would ultimately comply with its duty by the payment of the judgment. This, West Virginia did, as appears from an acknowledgment of satisfaction of decree filed in the Supreme Court of the United States, March 1, 1920,[38] in the case of *State of Virginia* v. *State of West Virginia*, (238 United States, 202).

We are still in ignorance as to the measures which can be taken; but it would appear that the principle is settled. Without entering upon a discussion of the question, which would carry us too far afield, it would seem that during centuries judgment and execution were two different things, so that it is at least unhistorical to say that that which did not exist for centuries is inherent in judgment. It is proper also to remark that the analogies upon which

[37] 246 United States, 565, 567.

[38] For the text, see J. B. Scott, *The United States of America—A Study in International Organization* (1920), p. 267.

Chief Justice White relied, in delivering the unanimous opinion of his brethren, were analogies of private, not of public law, and that judgments against bodies corporate in which execution was had were not those corporations known as States of the Union, but were mere creations of the States, to which the power of execution had been extended or was permitted.

In considering these matters, we should remember, I believe, that we are dealing with States which the Supreme Court repeatedly calls sovereign; and that a consent to sue, and to be sued, may not have meant to the States granting the permission that the agency of their creation, the government of the United States, should be vested with the power of using in ultimate resort coercive measures to compel the execution of a judgment against a State of the American Union.

In the earlier days of the Union, a decision of the Supreme Court that an individual of one State could sue and obtain a judgment against a State of the Union provoked an amendment of the Constitution expressly nullifying that alleged right; and an attempt to execute a judgment of the Supreme Court in favor of a State against a State of the Union might provoke disagreeable consequences. Sometimes the wisest use of power is non-use. And in doubtful cases, it is not wise to press an argument to its ultimate conclusions. There is not, it is believed, an authenticated instance of a failure of a modern and civilized nation to pay an arbitral award. They have disputed the justness of the award; they have delayed satisfying it; and sometimes they have secured a modification by peaceful means. But they have paid. As the great Cardinal Mazarin once said, during the period of the Frondes, "*On chante—mais on paie.*"

It is doubtful whether the nations at large have a higher standard of justice than the States of the American

Union; and it is scarcely to be believed that a State of the American Union would not meet its just obligations as ascertained by the Supreme Court, after it had had a reasonable time for that temper whereof States are possessed, to cool, and to prefer its good name to its pocketbook. One thing is sure. An international court of justice may indeed be in session, and its quota of judges upon the bench, but without a docket of cases if it is understood that the judgment of that court will be enforced by appropriate process. In this regard, I am sorry to say that the Supreme Court of the American Union is not a prototype of an international court of the Society of Nations.

I have thought it more interesting and less wearisome to take a series of concrete cases, to show how the suit of State against State in the Supreme Court begins, from the first motion for leave to bring suit, through its ramifications, down to the final entry of judgment, in order that we might see the infinite care which the judges have bestowed upon this class of cases; the more than courtesy with which the august litigants have been considered, and the anxiety with which the forms of equity pleading have been modified and moulded, to prevent even the slightest suspicion of injustice by their strict application. Repeatedly the judges mention that they are dealing with sovereign States; and the procedure which they have created and the judgments, interlocutory and final, which they have rendered are indeed fit models for the sovereign Nations of the world which have not as yet renounced the exercise of their external independence by entering into a close and constitutional union such as that of our United States.

Here I might bring to a close these observations upon the conduct of a case in the Supreme Court; for, as Mr. Justice Baldwin informs us, there is really no difference between a case of boundary and any other dispute susceptible

of judicial settlement. It would be unfair to judicial settlement and its possibilities, however, if we stopped here. It is not enough to show that a suit, a case, or a controversy may be finally decided in the Court of the States. It is necessary to show by concrete examples that other than boundary disputes have been submitted to that august tribunal, and by an enumeration with a word of comment—for we do not have time to examine them in detail—to make it clear that States of the American Union, and for that matter of the Community of Nations, can agree to submit differences and disputes and by their submission to a Court of Justice make those things "justiciable," to quote from Mr. Justice Bradley's opinion in *Hans* v. *Louisiana*,[39] "which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution." I hardly need pause to point out, at this stage of progress which we have already made, that the test of "judicial solution" is decision by a rule of law in being at the time or devised for the occasion by the States at loggerheads, as in the case of the *Alabama Claims*, or created by the Nations at large; and that, behind and beyond all, are the good will and wisdom of those to whom the destinies of States and nations are entrusted. Before taking up this phase of the subject, however, it is well to mention, although it can only be in passing, that the clause of the Constitution conveying consent is even larger than it seems to be, because the judicial power expressly extends to controversies to which the United States may be a party.

In a number of important instances, the Government of the United States has availed itself of the right to intervene, to protect, not its interests, for the Government of the United States has no interests of itself, but

[39] 134 United States, 1, 15 (1889).

as a Trustee for these United States, whereof it is the legal agent.

Appropriately enough, the first instances of intervention were connected with boundary disputes. It was decided in 1854, in the case of *Florida* v. *Georgia*,[40] that the Federal Government might intervene in the dispute between those States, inasmuch as such action was proper on the part of the Government if not essential to protect the interests above and beyond those of the States in immediate controversy. As it appeared to the court that there was no way in which the United States could review the decision of the Court upon a question of boundary between two States, "justice therefore requires," to quote the headnote, "that the United States, which represent the rights and interests of the other twenty-nine states, should have an opportunity of being heard before the boundary is established." The purpose of the intervention was not to secure a decree in behalf of the United States, but "to appear on behalf of the United States and adduce proofs in support of the boundary claimed by them to be the true one, and to be heard at the argument."

The Attorney-General appeared for the United States and filed information in its behalf, stating that the interests of the United States were involved in the settlement of the boundary line between the two States of Florida and Georgia. The United States did not become a party in the technical sense of the word — the government neither asking nor consenting that a judgment be entered in its behalf or against its contentions. The United States was not a litigant. It appeared to offer evidence; to explain its relevancy and its importance by argument; to aid the court in the interest of the two States actually in litigation to reach a conclusion which would safeguard the rights of the other States not before the court.

[40] 17 Howard, 478.

The magnitude of the case may be shown by a single sentence from the opinion of Chief Justice Taney, who spoke in behalf of the court. The Attorney-General had stated, in his information, among other things, "that the United States are interested in the settlement of this line; that the territory in dispute contains upwards of one million two hundred thousand acres of land, and was ceded to the United States by Spain as a part of Florida; and that the United States have caused the whole of it to be surveyed as public land and sold a large portion of it, and issued patents to the purchasers."[41] Here, again, equity pleading was moulded in the interests of the parties, the rules and orders of the court were stated to be framed in analogy to the practice of English Chancery, but not to be followed if—as the headnote puts it—it would embarrass the case "by unnecessary technicality or defeat the purposes of justice."

Chief Justice Taney justified the intervention of the United States against two strong dissenting opinions in this masterly manner:

> Here is a suit between two States, in relation to the true position of the boundary line which divides them. But there are twenty-nine other States, who are also interested in the adjustment of this boundary, whose interests are represented by the United States. Justice certainly requires that they should be heard before their rights are concluded by the judgment of the court. For their interests may be different from those of either of the litigating States. And it would hardly become this tribunal, intrusted with jurisdiction where sovereignties are concerned, and with the power to prescribe its own mode of proceeding, to do injustice rather than depart from English precedents. A suit in a court of justice between such parties, and upon such a question, is without example in the jurisprudence of any other country. It is a new case, and requires new modes of proceeding. And if, as has been urged in argument, the United States cannot, under the constitution, become a party to this suit, in the legal sense of that term, and the English mode

[41] 17 Howard, 491.

of proceeding in analogous cases is therefore impracticable, it furnishes a conclusive argument for adopting the mode proposed. For otherwise there must be a failure of justice.[42]

Its intervention in this case, without becoming a party, was but the first step to that form of intervention by which the Government of the United States became a party, and, indeed, the complainant. That it might file its bill in equity in the Supreme Court against a State of the American Union, was decided in 1892, some thirty-eight years later, in the case of *United States* v. *Texas*.[43] This was again a boundary case, and there was no doubt whatever that the United States appeared in its own interest, to use a phrase which is becoming common to-day, although it would be technically more proper to say in behalf of the States at large.

However that may be, the boundary of the Territory of Oklahoma was in dispute with Texas. If the Territory had then been a State of the Union, as is now the case, it could have haled its older sister into court. As a Territory, it could not, because the States had not given consent to be sued by territories. But the Territory is governed by the United States until such time as it shall become a State of the American Union. It would be, perhaps, too much to say that the Government of the United States appeared in this instance in behalf of a minor or an infant, or a *non compos mentis* person, or a ward. But it did appear; its appearance was contested and—allowed. Mr. Justice Harlan delivered the opinion of the court. He admitted it to be inherent in the nature of sovereignty that it was not amenable to the suit of an individual, without its own consent; but he stated, on behalf of the Supreme Court, that the rule did not apply to a suit of government against government.

[42] *Ibid.*, 494.
[43] 143 United States, 621.

It was a welcome sight to see the United States step down from its lofty pedestal to meet a State of the Union in the court room and to join issue with it upon a plane of equality. The unwontedness of the spectacle will justify a quotation here and there from the opinion of the Court.

To the bill of the United States, the State of Texas demurred on the ground among others that the question presented was "political in its nature and character, and not susceptible of judicial determination by this court in the exercise of its jurisdiction as conferred by the Constitution and laws of the United States."[44] To this contention, the learned Justice replied that between nations boundary disputes are political, but that they are judicial by the Constitution and that "that instrument extends the judicial power of the United States 'to *all* cases' . . . in which a State may, of right, be made a party defendant. . . ."[45] Upon this foundation of fact he reared his structure of law. "We cannot assume," he continued, "that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered"—we have had one Civil War, Justice Harlan might have said, in which he himself served in the armies of the North as a Colonel of Cavalry—"if to some tribunal was not entrusted the power to determine them according to the recognized principles of law. . . . It would be difficult

[44] 143 United States, 621, 631.
[45] *Ibid.*, 644.

to suggest any reason"—he concludes his opinion on this phase of the case—"why this Court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State."[46] But while this might be the reason of the thing, the Court sought to base the right of the United States to bring suit against a State of the Union upon the letter as well as the spirit of the Constitution; and Mr. Justice Harlan was equal to the occasion. "The States of the Union have agreed, in the Constitution," he added, "that the judicial power . . . shall extend to *all* cases . . . without regard to the character of the parties . . . and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, 'in which a State shall be party,' without excluding those in which the United States may be the opposite party."[47] There was nothing to do but to apply this reasoning in behalf of the United States, which would be, I imagine, in point of logic equally applicable against the United States, and to conclude that Texas, a latecomer to the Union, assumed the position of inferiority accorded to the original States. This Mr. Justice Harlan did to the satisfaction of a majority of his brethren: "The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the

[46] *Ibid.*, 621, 644–645.
[47] *Ibid.*, 646.

Union upon an equal footing in all respects with the other States."[48]

Four years later, in 1896, the case was finally decided. The boundaries between Texas, which had once been a Republic, recognized as such by the United States, and the Territory of Oklahoma were determined, making it clear that the judicial power created by the Constitution extended not merely to the States, but to the United States, which might, in behalf of the Union, summon into court a State of the Union.

Necessity is said to be the mother of invention. It is often the mother of law, and sometimes the cause of its violation. The desire for gain is one form of "necessity," and it is likely to last and to be controlling, inasmuch as it seems to be a natural, as well as an acquired instinct. The boundary line between the Territory of Oklahoma and Texas was settled by the most majestic of suits, with no less a person than the United States as complainant.[49] Had it not been for oil, the boundary would probably not have been questioned and made the source of further litigation. But oil was discovered in the bed of the Red River. We have been for the past few generations living in what may be called the "coal age"; and, with the ex-

[48] 143 United States, 646.

"Mr. Chief Justice Fuller, with whom concurred Mr. Justice Lamar, dissenting.

"Mr. Justice Lamar and myself are unable to concur in the decision just announced.

"This court has original jurisdiction of two classes of cases only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

"The judicial power extends to 'controversies between two or more States'; 'between a State and citizens of another State'; and 'between a State or the citizens thereof, and foreign States, citizens or subjects.' Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a State may be a party, and this is not one of them.

"The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.

"We are of opinion, therefore, that this case is not within the original jurisdiction of the court." pp. 648–649.

[49] *State of Oklahoma* v. *State of Texas*, United States, Intervener, 260 United States, 606 (1923).

haustion of the coal mines, we are entering, for an indeterminate period, what may be called the "oil age." Oil has given light—it is now used as fuel. It is easier to obtain than coal; easier to transport than coal; easier to handle and to use than coal. Our great ocean liners are being transformed into oil-burners, and the leviathans of the modern navy depend upon oil. Hence it was that some energetic and aggressive persons of Oklahoma sought to extract oil from the bed of the Red River, the boundary between Texas and the erstwhile territory of Oklahoma, now a full-blooded and equal State of the Federal Union; hence it was that some energetic and aggressive persons of Texas sought to extract the same oil from the same bed of the Red River; hence it was that the citizens of the two States, coming into conflict, called their respective States to their rescue and to the protection of their rights; and hence it was that the Government of the United States intervened in the dispute, in its own behalf, and to preserve peace between the parties.

To trace the various phases of this dispute would be interesting, but is here impossible. We must content ourselves with the statement that the court affirmed in every detail the decree in the second phase of the Texas case (162 United States, 1), decided in 1896, making the Red River the boundary between the two States at the points in question, adopting and applying the principles of *res judicata*. It only remained to apply to the present dispute the principle which the court declared had been definitively decided in the earlier case, and, of course, later to appoint commissioners in order to draw the line separating the two States. For our present purposes, it can only be said that the "bank" intended by the treaty of 1819 between Spain and the United States, upon which the case turned, was "the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed,

which separates the bed from the adjacent upland," and that "the boundary intended is on and along this bank at the average or mean level attained by the waters in the periods when they reach and wash the bank without overflowing it." Applying this principle to the local condition revealed by the evidence, the court located the boundary "along the southerly of the two water-worn banks . . . which separate almost uniformly the sand bed of the river from land in its valley, on either side, overflowed at times."[50]

The importance of the case, however, far transcends the boundary lines which it determined. This was a judicial question; the conflict between the States was a political question; the conflict between the citizens and the States, an economic question.

A State of the Union may not as yet summon the United States into court, but that will happen if the States think it to be to their interest. As the good people of the French Revolution used to say, "*Ça ira.*" If the States should not be content with suing an official of the United States, but should insist that the United States, in all their delegated majesty, should come into the court as a defendant, as Charles I once appeared hatless before an extraordinary court on a memorable occasion, an Act of Congress to that effect need only be passed, or an amendment adopted, making the agent of the States amenable to suit at the instance of the States. If this should happen, we should have the last word on judicial settlement, in so far as these United States are concerned, unless, in that stage of ultimate perfection which we hope may precede the Millenium, the State should allow itself to be sued by an individual, just as the individual consents to suit at the instance of his or her agent.

In the first year of the century which we hoped—at

[50] 206 United States, 606, 607.

least we did a few years ago—might mark an era in the progress of mankind, the State of Louisiana set its foot, as it were, across the physical boundary which had hitherto been the subject of disputes between States, and sought to invoke judicial power in the interest of its citizens against the improper action of the Governor and the Health Officer of Texas in the matter of "quarantines over infectious and contagious diseases." The bill was not allowed —not because a suit of this nature could not be brought in the Supreme Court, but because the bill failed to set up facts that would show it to be in effect a suit between the State of Louisiana as such, and the State of Texas in its capacity as State. The importance of the question justifies a quotation or two from the opinion of Chief Justice Fuller, to which there was no dissent, although Justice Harlan delivered a concurring opinion, and Justice White—later to be Chief Justice—and Justice Brown preferred to concur in the result without pledging themselves to the reasoning by which the result was reached. The learned Chief Justice —the first part of whose opinion is an admirable statement of the origin, nature, and extent of suits between States under the consent clause of the Constitution—said in the latter portion, denying jurisdiction:

> The complaint here, however, is not that the laws of Texas in respect of quarantine are invalid, but that the health officer, by rules and regulations framed and put in force by him thereunder, places an embargo in fact on all interstate commerce between the State of Louisiana and the State of Texas, and that the Governor permits these rules and regulations to stand and be enforced, although he has the power to modify or change them. The bill is not rested merely on the ground of the imposition of an embargo without regard to motive, but charges that the rules and regulations are more stringent than called for by the particular exigency, and are purposely framed with the view to benefit the State of Texas, and the city of Galveston in particular, at the expense of the State of Louisiana, and especially of the city of New Orleans.[51]

[51] *Louisiana* v. *Texas*, 176 United States, 1, 22 (1900).

This short statement is the gist of the suit, as the Supreme Court understood it from the pleadings. Mere injury caused by maladministration of the laws of a State is not sufficient, as a remedy lies by direct suit against its official. In the same way, suit would hardly lie against a Governor of a State for a mistake in the exercise of discretion, inasmuch as this would seem to be a purely political question. These matters are beyond, it would seem, the consent clause of the Constitution.

There is here no lack of remedy; for, although the States can not make war, or enter into treaties, they may, as the Chief Justice properly pointed out, "with the consent of Congress, make compacts and agreements." Herein is an immense source — almost unsuspected — of adjustment between the States of the American Union. The power to make external agreements the States delegated to the Government of the Union, thereby renouncing what we ordinarily term diplomacy. They also gave up the right to make agreements or compacts with one another, as by them the ways and practices of diplomacy would be introduced within the Union. It was, however, clear to the Framers of the Constitution, that there might be disputes which could be best settled directly by the States in interest. It was equally clear that the agreement or compact, while satisfying the desires or the needs of the parties, must not prejudice, injure, or menace the right or interest of other States, not parties to them. Hence, compacts and agreements between the States of the Union require the consent of Congress, acting in behalf of the other States. There are at least three ways in which the purpose of the contracting or compacting States can be carried into effect: by an authorization in advance of the proposed transaction; express consent after the agreement has been made and laid before Congress; or implied consent by failure of Congress to act, which is looked upon as equivalent to

acquiescence. On more than one occasion — indeed, frequently of late—the Justice delivering an opinion in the case of a suit between States has called attention to this clause of the Constitution, and suggested an application of it as the best method of ending a difference more aptly by negotiation and agreement than by judicial process.

In the absence of an agreement, however, the Chief Justice went on to say, "a controversy between States does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one State to a distinct collision with a sister State."[52] And the inevitable conclusion to be drawn from these facts was shortly stated; that the bill did not present facts to show that the State of Texas had "so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two States are in controversy within the meaning of the Constitution."[53] This was in 1901.

A year later, the Supreme Court found that the fact set forth in the bill of *State of Missouri* v. *State of Illinois and the Sanitary District of Chicago*[54] fell within its jurisdiction. It therefore overruled the demurrer of Illinois to the bill of Missouri, and required the defendants to appear and answer the charges properly pleaded by Missouri, that the discharge of sewage into the Illinois River and thence through the Mississippi, was such an injury to the State of Missouri as to justify an application for an injunction against the action complained of. In the end, the suit was dismissed in 1906,[55] after the answer had been filed, and evidence introduced by both of the States—on the part of Missouri to maintain its charges that the waters

[52] *Louisiana* v. *Texas*, 176 United States, I, 22 (1900).
[53] *Ibid.*, 22–23.
[54] 180 United States, 208.
[55] 200 United States, 496 (1906).

of the Mississippi passing its shores were polluted by the sewage improperly discharged by Illinois into the Mississippi; and by Illinois to show that there was no pollution, in fact, and if there were, it resulted from impurities discharged into the Mississippi by the State of Missouri itself. The jurisdiction existed, but the proof did not sustain its exercise; therefore, the bill was dismissed without prejudice—that is to say, a further resort could be had upon a showing that the facts justified the exercise of jurisdiction.

In the course of the opinion of the court, delivered by Mr. Justice Holmes, there is more than one statement of interest to the nations at large. "The nuisance set forth in the bill," he said, and he spoke for a unanimous court, "was one which would be of international importance—a visible change of a great river from a pure stream into a polluted and poisoned ditch. The only question presented was whether as between the States of the Union this court was competent to deal with a situation which, if it arose between independent sovereignties, might lead to war.[56] Whatever differences of opinion there might be upon matters of detail, the jurisdiction and authority of this court to deal with such a case as that is not open to doubt."

To the same effect is the case of *People of the State of New York* v. *State of New Jersey and Passaic Valley Sewerage Commissioners* "to enjoin," as stated in the headnote, "the execution of a project to convey the sewage of the Passaic Valley through a sewer system and

[56] 200 United States, 518.

"This is a suit to establish by judicial decree the true boundary line between the States of Virginia and Tennessee. It embraces a controversy of which this court has original jurisdiction, and in this respect the judicial department of our government is distinguished from the judicial department of any other country, drawing to itself by the ordinary modes of peaceful procedure the settlement of questions as to boundaries and consequent rights of soil and jurisdiction between States, possessed, for purposes of internal government, of the powers of independent communities, which otherwise might be the fruitful cause of prolonged and harassing conflicts." Mr. Justice Field in *Virginia* v. *Tennessee*, 148 United States, 503, 504 (1893).

to discharge it into a part of New York Harbor." As in the Missouri case, the court declared the right of New York to bring such a suit, "on behalf of her citizens"; and, as in the Missouri case, the evidence failed to show the damage feared—in this case, "to hulls of vessels or danger of air-borne disease to persons navigating or dwelling along the water, or . . . damage to persons bathing, or fish or oysters subsisting, in the water."[57] It appears that an improved plan of construction was likely to prevent the evils disclosed in the bill; and, while the injunction was refused, it was because of the improved plan—with the right reserved, of course, to New York to renew its suit if its apprehensions should be justified.

There is a passage in Mr. Justice Clarke's opinion for a unanimous court, pointing the way, as has been stated, to a renewed activity of the States through compact and agreement, in order to settle questions more economic and hygienic than legal. "We cannot withhold," he said, "the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."[58]

In the interval between the filing and the decision of the court in the Illinois sewage case, the Supreme Court decided, in 1902, that the State of Kansas[59] might invoke the jurisdiction of the court, where it appeared in behalf of its citizens and in vindication of its alleged rights as an individual owner—to paraphrase the headnote of the case—to obtain relief against direct action of Colorado, the defen-

[57] 256 United States, 296 (1921). Quotations are from Headnote.
[58] *Ibid.*, 313.
[59] *Kansas* v. *Colorado*, 185 United States, 125 (1902).

dant State, which deprived the complainant "of the water of a river accustomed to flow through and across her territory, and the consequent destruction of her property, and of the property of her citizens and injury to their health and comfort." The case was of the utmost importance, inasmuch as it involved a claim on the part of Colorado to preëmpt or to divert in the State of Colorado, the waters of the Arkansas River, before they flowed through Kansas, on their way to the Mississippi, irrigating and rendering productive the regions through which they passed. The right of the United States to intervene was denied by the court, on the simple ground that its only interest in the river was to preserve its navigability; and, as that question was not involved, it could show no interest either in its own behalf or in behalf of the States. The decision was unanimous, although two of the Justices preferred to concur only in the result. The majority of the court made it clear that the Government of the United States was one solely of enumerated powers; that it possessed no inherent powers of sovereignty, being a creation of powers delegated from the States; that the powers to be exercised by the Government of the Union were those, and only those, found in the Constitution of these United States, and that any power not necessarily or impliedly delegated which the Government of the Union might care to exercise, could be procured only by amendment of the Constitution, in the method prescribed by that instrument.

A few years later, the same question was litigated. In 1911, an important suit was begun by the State of Wyoming against the State of Colorado to prevent a diversion in part of the water of the Laramie River, a stream flowing from Colorado into Wyoming. Eleven years later, the case was decided by the Supreme Court.[60] The stream was not navigable, hence, according to the principle laid

[60] 259 United States, 419; *ibid.*, 496; 260 United States, 1 (1922).

down in the Kansas case, the United States would have no right to intervene. The Federal Government did not seek to intervene for any other reason, so the case was begun and concluded between the two States. There was no doubt that the State of Colorado had a right to use the waters of the Laramie River flowing through its territory before the stream reached Wyoming, as each of the two States in litigation recognized the right of appropriation of waters for irrigation. A familiar rule of law was invoked as decisive: that where rights are equal, the first claimant has the prior right, or, as we say in untechnical language, "first come, first served." But, of course, there must be a limit—otherwise there might be nothing left for the second State. Therefore, the principle laid down is the reasonable exercise of the right in such a way as to conserve the common supply, the patrimony and heritage of each. The rule invoked should be based upon what the court calls "the unalterable need for a supply"—that is to say, a supply fairly constant and dependable, or which may be brought within practical limits by storage and conservation of the water. For the purposes of reclamation and irrigation, a constant supply is essential to success. In the Kansas case, the result was negative; jurisdiction was accepted, but not exercised. In the Wyoming case, jurisdiction was carried into effect and justice done by the recognition of a principle so simple that one wonders why the litigating States had not thought of it in advance, and saved years of litigation and the enormous expense involved, by accepting and applying a rule of fair dealing, and therefore sound law, already at hand.

The last case to be considered in this connection is economic, and of first impression—that is to say, without precedent.[61] Natural gas is produced in West Virginia;

[61] *Commonwealth of Pennsylvania* v. *State of West Virginia. State of Ohio* v. *State of West Virginia.* 262 United States, 553 (1923).

and, if left alone, it spreads like oil under the surface into adjoining States. In the present instance, Pennsylvania and Ohio sought to enjoin West Virginia from attempting to retain the natural gas of the State, which, unless withheld, would spread into Pennsylvania and Ohio, where it was largely used, it seems, in public institutions, schools, and by official and private consumers, including, it is said, "most of the inhabitants of many urban communities and a substantial part of the population of the plaintiff State" —meaning Pennsylvania and Ohio—"whose health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream."[62]

The question was new; the principle was old.

It was clear that the people of West Virginia had the right to use natural products within its boundaries, and that the State could properly regulate their use in the interest of the community. But the stream of gas, being in the nature of a stream of water, it could not wholly exhaust. By situation and nature, it was an article of interstate commerce; and, by the Constitution, the power to regulate interstate commerce is, as stated by Mr. Justice Van Devanter, speaking for the court, "expressly committed to Congress and therefore impliedly forbidden to the States." This is familiar doctrine. Only the application is novel, and the reasons advanced have an interest for us. "The purpose in this," he continued, "is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation." The conclusion which he draws is more than interesting; it is fundamental. "It means that in the matter of interstate commerce we are a single nation—one and the same people."[63] This is

[62] 262 United States, 553.
[63] *Ibid.*, 596.

apparently what commerce has made of the citizens of the American States; this is what commerce is in process of doing for the world at large. It is breaking down barriers; and, while politically the States are various, in the matter of commerce they are becoming as one. But to return to and finish with Mr. Justice Van Devanter: "All the States have assented to it, all are alike bound by it and all are equally protected by it."[64] An international agreement would have the same effect, and would be enforced, it is to be hoped, in much the same way by an international court of justice. As the State, under these circumstances, could not regulate its natural product in such a way as to discriminate against commerce between the States, it followed that the attempt to do so was illegal; the act itself, unconstitutional; and that therefore officials of the State of West Virginia seeking to enforce the statute should be enjoined from so doing by process of court.[65]

Not the least contribution of the early statesmen of America was the recognition that force could not be used against States or nations without resulting in war, because force in return is such. They wished a union of States from which force should be excluded. They hit upon the happy expedient of a court of justice to determine the meaning of the Constitution (it would be the same with a treaty between nations), and without proceeding against the State by force of arms, to restrain the individual seeking to act under a law of the State at variance with the Constitution (between nations it would be a treaty). This is

[64] *Ibid.*

[65] For the official texts of the decisions of the Supreme Court in suits between States, up to and including 1918, see, J. B. Scott, *Judicial Settlement of Controversies between States of the American Union*, 2 vols. (1918); for a statement of the essential facts in the decisions of these suits, see Scott, *An Analysis of Cases Decided in the Supreme Court of the United States* (1919).

For a list to date of decisions in suits between States in the Supreme Court, with an indication of the subject-matter of each, see Appendix II, No. 3, pp. 267–271.

the culmination of judicial settlement; this is restraining the arm of the State by the decree of the Court.

Writing in 1861, John Stuart Mill said, in his *Considerations on Representative Government*[66]:

> The usual remedies between nations, war and diplomacy, being precluded by the federal union [of the United States], it is necessary that a judicial remedy should supply their place. The Supreme Court of the Federation dispenses international law, and is the first great example of what is now one of the most prominent wants of civilized society, a real International Tribunal.

[66] *Op. cit.*, pp. 305–306.

VI

SOVEREIGN STATES BEFORE THE HAGUE TRIBUNAL OF ARBITRATION AND BEFORE THE PERMANENT COURT OF INTERNATIONAL JUSTICE

TOWARDS the close of the nineteenth century, it had become apparent that arbitration, brought to the notice of the nations by John Jay and his treaty of 1794 with Great Britain, had justified itself in practice, and appealed to the imagination of men of good will in the world at large. It had become evident that the time was ripe for joint action on the part of many nations to provide some means whereby the choice of arbiters should be aided, the formation of arbitral tribunals facilitated, and the rules of arbitral procedure set forth for the general information of the nations, the special convenience of the countries in controversy, and the arbiters appointed to adjust their differences.

The distinction between arbitration and judicial settlement was not drawn: indeed it was scarcely noticed outside of the United States; and, even within our country, the word "arbitration" was used in a general and all-embracing sense for the settlement of disputes between nations which direct diplomacy or diplomatic agencies had failed to adjust, compromise, or otherwise get out of the way.

On the eve of the first Peace Conference at The Hague, almost within a twelvemonth of its call and a trifle more than two years before its actual meeting on May 18, 1899, President McKinley plainly said in his first inaugural address of March 4, 1897: "Arbitration is the true method

of settlement of international as well as local or individual differences. It was recognized as the best means of adjustment of differences between employers and employees by the Forty-ninth Congress, in 1886, and its application was extended to our diplomatic relations by the unanimous concurrence of the Senate and House of the Fifty-first Congress in 1890."[1] The concurrent resolution to which Mr. McKinley referred requested the President "to invite, from time to time as fit occasions may arise, negotiations with any Government with which the United States has or may have diplomatic relations, to the end that any differences or disputes arising between the two Governments which can not be adjusted by diplomatic agency may be referred to arbitration, and be peaceably adjusted by such means."[2]

The meeting of the representatives of twenty-six nations at The Hague seemed to be one of these "fit occasions"; and the American delegates to the First Peace Conference were "enjoined" by Secretary of State Hay "to propose, at an opportune moment, the plan for an international tribunal," appended to the instructions, "and to use their influence in the conference in the most effective manner possible to procure the adoption of its substance or of resolutions directed to the same purpose."[3]

This plan for an international tribunal for the promotion of international justice contemplated acceptance by at least nine Powers. The proposed court involved the appointment of a judge of "personal integrity and learning in international law" by the Supreme Court of each of the nations. It was to be a permanent body of judges with power to fix its place or places of meeting, to appoint its personnel, to frame its rules of procedure, and always to be

[1] James D. Richardson, *A Compilation of the Messages and Papers of the Presidents*. Supplement, 1899–1902 (1903), p. 13.
[2] *Congressional Record*, December 9, 1889; vol. XXI (1889), p. 125.
[3] *Foreign Relations of the United States* (1899), pp. 511, 513.

open for the filing of cases which the contracting nations should "mutually agree to submit to the international tribunal." Its jurisdiction was to be vast, embracing "all questions of disagreement between them, excepting such as may relate to or involve their political independence or territorial integrity." From the permanent panel of judges, "a bench of judges" of not less than three or more than seven was to be "appointed by the unanimous consent of the tribunal," from which "a native, subject, or citizen" of the nation in litigation was to be excluded. The tribunal was to be open to non-signatory Powers. Its expenses were to be borne equally by the adhering Powers, and the special expenses of the particular case determined by the tribunal; all Powers using it were to bind themselves to comply with the judgment, and the judgment itself might be reëxamined at the request of one or other of the litigants within three months for "a substantial error of fact or law." We have here an unconscious recollection of the 9th of the Articles of Confederation. Under the Articles, a certain number of judges was to be appointed, three from each State, to be reduced to thirteen by the process of alternate striking; from this number nine were to be drawn by lot; and, of these, not more than seven or less than five were to be selected to form the special court or commission. According to the plan for the international tribunal, the Supreme Court of each nation was to appoint one judge. The number was indefinite but could not be less than nine; and from this number a "bench of judges" not less than three or more than seven was to be appointed by the panel of judges, apparently by the agents of the nations.

The American plan was presented; a Russian plan made its appearance; Great Britain proposed a compromise; and, with the good will of all, the so-called Permanent Court of Arbitration of The Hague was formed with the best parts of each and, in the end, better than any or all of them.

Each nation was to appoint for a period of six years not more than four persons morally and mentally fit and able and willing to accept the title and duties of arbitral judges. The names were to be sent by each of the contracting nations to the International Bureau of The Hague, a register's or clerk's office for the Court, which in turn was to communicate the names of the judges to the nations. We have here a permanent panel or list of judges; and, from it, "a special bench of judges" or temporary tribunal was to be formed for the trial and disposition of the difference which the nations in controversy should be willing to submit to this form of settlement. We have here something like the early procedure of the American States. The Congress representing the States appointed three from each of them: each nation of the community of contracting nations appointed not more than four; in the early instance the number was reduced to thirteen and by lot to nine, from which a temporary court or commission was to be formed for the settlement of the case; in The Hague plan, three or five were to be selected, but those who have had experience in the matter know that "undesirables" are struck from the permanent panel or list and a selection made from the remainder.

The temporary court or commission of the Articles was not completely satisfactory, and was to be replaced within a decade by that permanent tribunal of the States which we call the Supreme Court. In like manner, within a decade, a proposal was to be made to create alongside of the Court of Arbitration a truly permanent Court of International Justice. In each case, the initiative came from the United States. In the national instance, it was successful at the first attempt; in the international instance, it was successful in principle and was completely realized at a second and smaller Conference some thirteen years later.

The reasons which led the United States to propose a

permanent tribunal for international arbitration have been given; the reasons which caused the proposal for a permanent court of justice will now be stated in the language of its proposer, Secretary of State Root. In his instructions to the American delegates to the Second Peace Conference meeting at The Hague in 1907, he said:

> There can be no doubt that the principal objection to arbitration rests not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitrations to which they submit may not be impartial. It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results. It very frequently happens that a nation which would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process.[4]

How was the reluctance of the nations to be overcome? Mr. Root was of the opinion that, if it could be by

> a tribunal which would pass upon questions between nations with the same impartial and impersonal judgment that the Supreme Court of the United States gives to questions arising between citizens of the different States, or between foreign citizens and the citizens of the United States, there can be no doubt that nations would be much more ready to submit their controversies to its decision than they are now to take the chances of arbitration.

Therefore he instructed the American delegates

> to bring about in the Second Conference a development of the Hague Tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of

[4] *Foreign Relations of the United States*, 1907, pt. 2, pp. 1128, 1135.

judicial responsibility. These judges should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented. The court should be made of such dignity, consideration, and rank that the best and ablest jurists will accept appointment to it, and that the whole world will have absolute confidence in its judgments.

The American delegates did as directed, and succeeded not only in having the principle of judicial as distinct from arbitral adjustment accepted, but also in securing the acceptance of a draft Convention for a permanent Court of Justice under the title, slightly different and somewhat misleading, of Arbitral Justice.[5] The Convention consisted of some thirty articles dealing with the organization, jurisdiction, and procedure of the Court. The judges were provided for. The method of their appointment was left to the agreement of the nations through diplomatic channels. Great progress had been made, and it was hoped that the process would be completed during 1914. The World War broke out and postponed further consideration of such unheroic remedies as courts of justice for the settlement of disputes between nations.

The matter, however, was not overlooked in the treaty of peace imposed upon Germany, which had begun the Great War by its declaration of war against Russia on August 1st, and against France on August 3d, and its invasion of Belgium on the night of the 3d and the morning of the 4th, thereby bringing Great Britain into the list of its enemies. In the first part of the Treaty of Versailles creating a League of Nations, the Council of the League was to devise and submit to the nations a plan for a permanent Court of International Justice. The Council is a political body; and it wisely decided to call to its aid a number of leading jurists to elaborate the plan to be submitted to the Council, to the Assembly of the League,

[5] Appendix II, No. 5, pp. 299–308.

and in ultimate resort to the formal approval of each of the members of the League, to be evidenced by the signature of a diplomatic document called a protocol. Ten jurists were ultimately selected, five from the "big," five from the "little" nations, to form an Advisory Committee to the Council. They met in the Peace Palace of The Hague in the summer of 1920. They began their labors on June 16th, and they adjourned on July 24th of that year, with a plan of a Permanent Court of International Justice as closely modeled on the Supreme Court of the American States as one tribunal can resemble another without being identical.[6] This was due to the presence of Mr. Root, who had suggested such a court in 1907, and whose firm and deft hand put it into shape in 1920. Unfortunately, some of its provisions were rejected by the Council, others by the Assembly, so that the result is in effect the draft Convention of 1907 under a new name and with a method of 1920 for appointing the judges which was wanting in the earlier draft.

Let us take up the method of appointing the judges; for a court without judges is as imperfect as it would be useless without litigants. It is to be said at the outset that if it was found possible for the Advisory Committee of Jurists to do in 1920 what the Peace Conference of 1907 had failed to do, it was because circumstances had changed. If the circumstances of 1920 had prevailed in 1907, Mr. Root could then have proposed the method which he did in 1920. What were the newer circumstances which both permitted and suggested the method? The first part of the Treaty of Versailles is entitled the "Covenant of the League of Nations." This treaty was signed on June 28, 1919, by some twenty-eight Powers, including Germany, although that Power was not then admitted to membership in the League created by the treaty as were all the other

[6] Appendix II, No. 7, pp. 310–325.

signatories of that famous but discredited document. It went into effect on January 10, 1920; and, in the interval between the two dates, the League of Nations had been organized with Geneva as the seat of its many activities.

There was at the Peace Conference of Paris the usual conflict between the larger and the smaller Powers, a conflict inevitable as long as the larger Powers insist that mere bigness gives them greater legal rights. At the very beginning of the Conference "the Principal Allied and Associated Powers" promptly put "the little ones" in their places by informing them that the Conference was one of Victors; that the larger Powers had twelve million men on the battle front; that that was a "title"; that they did not need to invite the smaller Powers; and that the little ones might withdraw if they did not care to accept the invitation and the positions assigned to them by the Powers which had won the war. The little Powers remained. These big Powers were the United States, the British Empire, France, Italy, and Japan. The rest only counted in numbers, not in influence. Even among the five, there were differences. Japan sat in the Supreme Council only when its interests were concerned. Italy was, one may say, merely tolerated: it was neither trusted nor treated upon a plane of equality. An inner group of three ran matters with a high hand; and, of the three, France had influence only when it agreed with the representatives of the other two, or when they differed and France, according to its interests, agreed with one or the other. Of the two English-speaking Powers, one is said to have had greater influence than the other, but when they were united they were invincible. On the point of the superiority of themselves, the five Principal Allied and Associated Powers were agreed; and the machinery of the League of Nations was so devised that nothing could be done without their agreement.

In the Assembly of the League, all Powers were to meet on a footing of equality. But nothing was to be done without the Council; and this body was to be composed of nine members, five permanent—our friends the Principal Allied and Associated Powers—and four members to be elected by the Assembly. In the Assembly, where the smaller Powers predominated, they could be trusted to look after their own interests; in the Council, where the larger Powers were in the majority and where nothing could be done of importance without unanimous consent, the interests of the larger Powers would be safeguarded. The situation is not wholly dissimilar to that of the Congress of the United States. In the House of Representatives, the larger population of the larger States gives them a majority of the members of that body; and since, according to the Constitution of the United States, revenue bills, the sinews of peace as well as of war, originate in that house, the interests of the larger States cannot well suffer. In the Senate, on the other hand, each State, large or small, has two members; and, as the smaller States are the more numerous, it is evident that their interests are not likely to be overlooked. In fact, each house is a check upon abuse of power by the other; and differences of opinion are reconciled by a conference committee of three members appointed by each branch of the Congress acting under the pressure of public opinion. Mr. Root took a leaf out of Madison's Debates in the Federal Convention of 1787, supplemented by his experience as Senator from the State of New York; and the Permanent Court of International Justice was made. He proposed the election of the judges by the separate and concurrent action of the Assembly (where the smaller States predominate in numbers if not in influence) and the Council (where the larger States predominate both in numbers and in influence), and a conference committee of three from both to propose a compromise

acceptable to the Assembly and the Council when they happen to differ as they did on the first election of the judges in 1921. The method seems simple to us as we have been familiar with it for the past century and more; it seemed difficult to the other members of the Advisory Committee of Jurists at The Hague, unfamiliar with Madison's Debates and the procedure of our Congress. A copy of Madison's Debates, however, lay on the table before each member to be consulted by them to their profit; and Mr. Root was present in person to explain to them the advantages of the system and its intricacies of detail in practice. After discussion and explanation, the method proved satisfactory to them; it was satisfactory to the Council, it was satisfactory to the Assembly, and it was then and is still satisfactory to the World.

The matter is so important and redounds so to the credit of the United States and its most eminent Citizen that I beg to discourse somewhat at length upon this phase of the subject; for the American method made the Court, and realized the hopes of men and women of good will in all parts of the World who have dreamed of the day when the powerless hand of justice should stay the sword of the mighty.

After the members of the Committee had expressed their views on the formation of the Court, the representatives of the larger nations in favor of their interests, those of the smaller in behalf of theirs to the dissatisfaction of all, Mr. Root on June 18th poured the oil from an American vial upon the troubled waters of the World:

> Allow me [he said] to refer to an example which naturally arises in the mind of an American. When the present Constitution of the United States was formed there was precisely the same kind of question raised in the Convention of 1787. We were all independent, sovereign states—some large, some small. The large states were unwilling to permit the majority of the smaller ones the control which would come from equal

representation, and, on the other hand, the smaller states were unwilling to allow to the larger ones the preponderance of power which would arise from the recognition of their greater population and wealth.[7]

This was the difficulty with which the Advisory Committee was confronted. How should it be overcome? 1787 gave the answer. "That *impasse* was disposed of by the creation of two chambers, in one of which the states were represented equally, and another in which the population is represented without reference to the sovereign states in which the people reside."[8] Mr. Root was too old a hand to force the American solution upon the members of the Advisory Committee. He merely suggested it, leaving it to them to adopt when they should recognize it as the only way out of the *impasse* of 1920.

I beg to suggest [he continued] for the consideration of my colleagues, whether possibly the election of judges by the concurrent vote of the Assembly and the Council might not point out, for our purpose, the same solution of this difficult question which already has been accomplished on the political side. That would have several advantages. The effect of the necessity of concurrent action by two bodies is that neither one can do anything which is oppressive in respect to the interests specifically represented by the other. That is so in the making of all laws, and it is so when appointments are to be made by legislative bodies. The effect of the practical working would be, that in the Assembly, where the smaller Powers are in majority, they would protect the interests of the smaller states, and that in the Council the larger Powers having a preponderence would protect such practical interests of their greater trade and their greater production and the greater interests as would be submitted to the court.[9]

His colleagues of the smaller States preferred the election by and in the Assembly of the League where all States large and small met upon the footing of equality. Mr. Root

[7] J. B. Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists. Report and Commentary* (1920), p. 31.

[8] *Ibid.*

[9] *Ibid.*, p. 32.

saw that no plan violating equality would succeed.[10] He therefore took pains on another occasion to show that the principle of equality was neither involved nor jeopardized. He admitted then, as he had always said before the meeting and maintained since, that equality is "the substratum which underlies the law of nations; without that there is no law, and we return to the days of barbarism and unrestrained brute force."[11] He proceeded, however, to define equality to show what it is and what it is not:

> The equality of states does not mean [he said] that they are equal in number, in extent of territory, in wealth, in power; it means that they are equal in the sovereign right to control their own actions and to freedom of accountability to others. It relates to the rights of each state over its own territory, its own subjects or citizens. Every state is exercising that right in agreeing or refusing to agree to any arrangements we propose. Monaco, Luxemburg, Haiti, San Domingo, have the same inalienable right to consent or refuse to consent as Great Britain or France. That is the exercise of equality. In brief, it is equality in the exercise of the rights of sovereignty.[12]

With the essence of equality in international law determined, he then argued that the question involved in the choice of judges of the Court is not one of equality but of consent, and that each power consents for itself:

[10] In one of Madison's last letters, written to an unknown correspondent in March, 1836, at the most three months before his death, there is a passage on the question of the equality of the States, showing what a lasting impression the question and controversy had made on those who lived through the formative period of the Union:

"It is well known that the equality of the States in the Federal Senate was a compromise between the larger and the smaller States, the former claiming a proportional representation in both branches of the Legislature, as due to their superior population; the latter an equality in both, as a safeguard to the reserved sovereignty of the States, an object which obtained the concurrence of members from the larger States. But it is equally true, though but little adverted to as an instance of miscalculating speculation, that, as soon as the smaller States had secured more than a proportional share in the proposed Government, they became favourable to augmentation of its powers."

Letters and other Writings of James Madison, published by order of Congress, vol. IV, 1829–1836 (1865), p. 429; Gaillard Hunt, *The Writings of James Madison*, vol. IX, 1819–1836 (1910), p. 608.

[11] Scott, *Project of a Permanent Court*, p. 33.

[12] *Ibid.*

When, however, we come to the creation of a court, we pass beyond the exercise of the rights of sovereignty. In naming or constituting a court which is to render judgments limiting the rights of nations, we shall not be merely exercising the powers of sovereignty. What sovereign right has France to limit the sovereignty of Italy, of Great Britain? What sovereign right has Italy to name a judge to say if the power of France should be limited? From whence does this power come? From the sovereignty of Italy? It comes from consent, it has its origin in consent; not in the theory of sovereignty, not in the law of nations; it is purely conventional. The right of Italy to name a judge who can give decisions limiting the sovereign rights of France comes not from the sovereignty of Italy but from the consent of France.[13]

A satisfactory method of choosing the judges had to be found, a difficult problem, to be sure, but nevertheless one which good will and mutual concession could be expected to solve when once the thorny question of equality no longer irritated the representatives of the smaller and larger States to such a degree as to prevent the consideration of any plan upon its merits. Hitherto the question of equality had been a preliminary and an insurmountable obstacle to any project; hereafter it became merely one element of the problem. The Committee of Jurists could, confident of the success of their labors, set themselves to the task of considering "the conditions and circumstances of the agreement" which the Nations at large would consent to make in the untrammelled exercise of their admitted sovereignty. As showing how this could be done, Mr. Root explained how it was done in the Universal Postal Union, to which all Nations and even States of constitutional law are parties, and where the larger States pay more and the smaller States less. They are rated according to their interests. What would the smaller States get by a Court of Justice? Protection against the aggression of the greater powers which would renounce the use of force. There were thus two sides to the question; and no

[13] *Ibid.*, p. 33.

solution would be satisfactory which did not consider what was just and unjust to each side. "What we are to seek," he said, "is a practical means of so limiting the weaknesses, the passions, of so enlightening the ignorance and awakening the understanding of men engaged in the affairs of nations that there will be the highest possible probability of justice being done."[14] Reverting to the aggression of the strong, he used Norway by way of example, and this portion of his address made a deep impression upon its representative sitting opposite to Mr. Root at the table. "We are not called upon by the general voice of the civilized world to make an effort towards the establishment of a court to curb the power of Norway; of Holland. The Great Powers, with their immense armies and navies, in the presence of which the smaller nations of the world feel that their lives are in danger unless justice prevails and a practical method of securing justice be agreed on, are to be curbed."[15] From this point of view, there were two groups of States: "One is the group that is giving, another the group that is receiving"; and Mr. Root was clearly justified from this point of view in saying that "it is not reasonable to suppose that these great states will consent to have their power limited, to surrender their sovereignty to a tribunal, the constitution of which is to be entirely within the control of the smaller states. The simple constitution of the court by a majority of equal states would place them in the hands of the smaller states who give little and get much, and always they would have the power to override the larger states which give much and get little."[16] The inevitable conclusion was that the Council in which the larger States preponderated and the Assembly in which the smaller States had an overwhelming ma-

[14] Scott, *Project of a Permanent Court*, p. 34.
[15] *Ibid.*
[16] *Ibid.*

jority should coöperate, and each voting concurrently but separately would consider the interests of its group and prevent an abuse of power by the other. The members of the Advisory Committee found themselves forced by the strength of Mr. Root's argument, its justice toward large and small, and the circumstances in which they were placed, to accept the American proposition.

With its adoption in principle, everything else was a matter of detail. It was comparatively easy to agree that the judges of the Permanent Court of Arbitration in each of the Countries, parties to the Pacific Settlement Convention of The Hague, should recommend not more than four persons of whom not more than two should be their nationals; and that the names of such persons should thereupon be sent to the Secretary General of the League of Nations, who should in turn arrange the names in alphabetical order and transmit them to the Assembly and Council. The winnowing of the wheat from the chaff and the selection of appropriate candidates for the International Bench would be done in advance by a competent body of every country; the clerical details would be arranged by a competent Secretariat; and the members of the Assembly and of the Council would find themselves in the possession of a large and imposing list of persons who, in the opinion of one or more countries, would make acceptable judges of an International Court of Justice. But it was the countries and only the countries represented in the Assembly and Council which would appoint the judges from the candidates recommended by the various National Groups. It is one thing to suggest; it is another to appoint; and it was doubtless advisable to have the suggestions come from the National Groups whose members would in many cases, if not in all, consult with their respective Governments. Competent individuals can indeed recommend, but Governments act; and a nation can be expected

to be bound only by its agents of political power acting under instructions. National judges are always appointed by political power; and international judges are likewise to be appointed by political power through the concurrent, separate, and independent action of the Assembly and Council of the League. It was a mere detail whether the Conference Committee might, in exceptional cases and by a unanimous vote, suggest to the Assembly and Council somebody not recommended by the National Groups; and it was likewise a matter of detail if the members of the Court were authorized to fill vacancies from the list of the National Groups when the Assembly and Council were deadlocked and could not agree on the rest of the judges to be elected. These were of course important matters, as is everything connected with justice and its administration. They were, however, incidentals; they could not stand alone. They could come into play, if at all, only when the principle of selection had been proposed and when it was accepted. The Court was *in posse*. The method had been found. The rock on which the Conference of 1907 split was circumvented. If the Advisory Committee had merely embodied this method of appointing the judges in the Draft Convention of 1907, the result would have been in its essentials the Statute of the Permanent Court as it left the Assembly of the League in 1921. Wisely, the Committee added features which would have made of the Draft of 1907 a fair replica of the Supreme Court of the United States; unwisely, the Assembly rejected the most valuable, modified others, and added some of its own.

In the third lecture, I spoke in general terms of arbitration as the ultimate round in the ladder leading up to judicial settlement. To understand the Permanent Court of Justice now installed in The Hague, it is advisable to go somewhat into details and to consider the Permanent Court of Arbitration of The Hague Conference of 1899

and the Draft Convention for the Court of Arbitral Justice of the Hague Conference of 1907, and to see how these helped the Advisory Committee of Jurists at The Hague to prepare the project of 1920. All three were made at The Hague and all are the outward evidence of a continued process of development from arbitration through arbitral justice to justice without qualification.

The preamble of the Pacific Settlement Convention contains certain statements which are fundamental and are the point of departure for progress towards peaceful settlement. In the first place, the preamble recognized "the solidarity which unites the members of the Society of Civilized Nations." This did not of course create a Society of Nations which has existed in a more or less conscious form for centuries. It did, however, state that the Nations are united by their interests and that the civilized countries form a block or unit. These interests are declared to be: that "general peace" should be maintained, and "the friendly settlement of international disputes" established; that the welfare of peoples and the security of States are based on the principles of equity and right; that "the empire of law" should be extended and "the appreciation of international justice" strengthened; and that "the permanent institution of a Court of Arbitration, accessible to all, in the midst of the independent Powers would contribute effectively to this result." The First Conference furnished "equity" with an institution—the Permanent Court of Arbitration; the Second Conference attempted to provide "right" with an institution—the Permanent Court of Arbitral Justice; the Advisory Committee of Jurists at The Hague perfected the institution; and the League of Nations established the Permanent Court of International Justice. The work is not the work of one but of many; and the best minds of the world have, in different ways and at various times, coöperated, giving the

rough materials artistic form and shape and fitting them into the Temple of International Justice.

Of each of these institutions in turn.

After defining arbitration, the Pacific Settlement Convention declares it to be the most effective and equitable means of settling disputes which diplomacy has failed to settle. The settlement is to be effected by means of a Convention submitting to arbitration controversies outstanding at the time or arising subsequently between the nations, and by means of the Permanent Court of Arbitration foreshadowed in the preamble. The method of forming the special tribunal for the adjustment of the dispute is devised, and the procedure to be followed is drafted. Nothing is left to the nations but the good will to avail themselves of peaceable settlement. We are already familiar with the appointment of the judges by the parties to the Pacific Settlement Convention. Each is to appoint four persons learned in the law of nations and of reputable character. These form the permanent panel or list of judges of the Court from whom the three or five members of the special tribunal are to be chosen by the nations in controversy. To this Tribunal the controversy is submitted for settlement. In a special agreement, the parties define the difference, determine the powers of the arbitrators, and state the principles of justice or rules of law to be applied in its determination. The special tribunal comes in and goes out with the case. The Hague type of tribunal consists of five members to be appointed by the parties if they agree; if they do not, then, according to the Pacific Settlement Convention as revised in 1907, each of the parties appoints two members from the permanent list, of whom only one may be its national or its representative in the panel, and the fifth member, who presides over the tribunal as umpire, is chosen by the four members. Failing to agree, the Parties request a third Power to make the appointment; and, fail-

ing to agree on this, each Party selects a different Power and the two together select the umpire. This method is likely to assure the composition of the special tribunal; if it does not, the Second Conference makes assurance doubly sure by providing, as a last step, that each of these two Powers presents two names taken from the permanent panel and that a drawing of lots determines which of the candidates drawn is the fifth member and umpire. The selection of the special tribunal is no easy matter, but all obstacles are overcome if only the desire to arbitrate be accompanied by good will. The parties are aided by the International Bureau appointed by the diplomatic agents of the Powers at The Hague which have ratified the Pacific Settlement Convention. The Bureau acts as registry to the Court, and is controlled by the Permanent Administrative Council, which is composed of the diplomatic representatives of the contracting Powers at The Hague under the Presidency of the Dutch Minister for Foreign Affairs.

Each Party is represented before the Tribunal by an agent to prepare and to be in charge of the case, and by counsel to argue it. The statement of each Party is prepared in advance of the meeting of the Tribunal, and is delivered at stated times to the adverse Party and the judges of the Court. At the pleasure of the Parties, the statement may consist of the case, counter-case, and reply. The case is a general statement of the controversy. Each Party delivers its case at the same time, fixed in advance; the counter-case is an answer to the other's case; and a reply is or may be a general summing up, or in the nature of an answer to specific points mentioned in the previous statements of the august antagonist. These various statements called written pleadings are accompanied by the documents as evidence upon which the Parties rely.

When the Tribunal assembles, the Judges are familiar

with the controversy; counsel argue orally, and explain and elaborate the views of the Governments as stated in the written pleadings, and answer questions put to them by members of the Tribunal. New evidence may be offered, which must of course be communicated to the adverse Party; and the Tribunal may ask for additional evidence or documents. The Tribunal dominates all proceedings; and, by Article 48, it is "authorized to declare its competence in interpreting the *compromis* [special agreement] as well as the other treaties—[the revision of this Article by the Second Conference suppresses 'treaties' and substitutes 'papers and documents']—which may be invoked in the case, and in applying the principles of international law." The tribunal has a free hand; it is independent of the Parties in the meaning it attaches to the special agreement, papers, and documents, although it will not lightly disregard their common understanding; and it is untrammelled by precedents.

When the agents and counsel have submitted "all explanations and evidence" in support of their respective governments, the tribunal closes the proceedings and its members withdraw to consider the case and to prepare the award. This ends the litigation unless there be a provision to the contrary in the special agreement permitting it to be reopened on certain contingencies. The award may be unanimous; to be valid and binding it must be concurred in by a majority of the judges. It is accompanied by a statement of reasons; it is drawn up in writing and signed by each member of the tribunal, and each member has the right to record his dissent. The revision of 1907 modified this provision to the effect that the award is to contain the names of the arbitrators and to be signed for purposes of authentication by the president or registrar, and the dissent of the minority is not noted. The English-speaking world prefers a dissenting opinion to a mere "record" of dissent;

but the Continental Countries seem to object to this procedure. They believe that a dissenting opinion weakens the award; whereas the English-speaking peoples hold that dissent throws light upon the case, and that a judgment is not acceptable which cannot stand the test of the dissenting views of a minority. The English-speaking peoples are likewise in favor of a rehearing under certain circumstances, such as mistake of a material fact, and the discovery of new evidence which, if known, should have influenced the award. The Continental Countries are anxious that the award should be just; but they believe that arbitration should end the case and get it out of the way. Everybody agrees that an award in excess of the terms of submission, or in direct violation of its terms, or tainted with fraud, should be null and void; but the difference between the English-speaking and Continental peoples is fundamental; the one approaches arbitration from the judicial point of view; the other from the standpoint of compromise.

The procedure to be followed in the Arbitral Court of Justice, we need not here consider, as Article 22 of the Draft Convention of 1907 provided that the Court was to follow the rules laid down in the Pacific Settlement Convention except in so far as the procedure was laid down in the draft. These rules for the most part were lifted bodily from the Pacific Settlement Convention and inserted in the project of 1920. The requirement of the project that the various juridical systems of the world should be considered in the selection of judges, was transferred from the preamble of the draft convention of 1907. The provision of the draft for a committee of these judges makes its appearance in the new. The number of judges was not specified in the draft convention; it is fixed in the project at eleven titular judges and four deputies, with the understanding that the titular may be raised to fifteen and the deputies

to six. In the draft of 1907, they were to serve for twelve, in the project for nine years.

In the plan of 1920, a nation without a judge on the bench may appoint one of its nationals to sit during the trial and disposition of the case to which it is a party. This was taken from a project agreed to by Germany, the United States, France, and Great Britain, at The Hague in 1910.

In the draft of 1907, the Court was to be "competent to deal with all cases submitted to it, in virtue either of a general undertaking to have recourse to arbitration or of a special agreement";[17] that is to say, a nation could not hale before the Court a nation with which it had a controversy; consent was required. This is in effect the provision of the Statute of the Permanent Court after the League had rejected the provisions of the plan which would have permitted nation to file its suit against nation and proceed *ex parte* in the absence of the defendant State duly notified of the suit but not appearing. This was, however, stricken; and the Court is lowered in this respect to the position of a tribunal of arbitration with a permanent panel of judges. There is, on the other hand, a provision of importance in the Statute carried over from the plan determining the order of the sources of law and their application, which did not directly or indirectly figure in the draft of 1907. These matters deserve more than a passing notice; for, had they been all retained, the present Permanent Court would have been something very different from that of 1907.

The Advisory Committee of Jurists confined the Court —and properly—to suits between States. It wished, however, to have all disputes of a certain category submitted to the Court when diplomacy had failed to adjust them; and Article 33 of the plan authorized and required the Court to determine whether the diplomatic means had been

[17] Article 19, Appendix II, No. 5, pp. 304–305.

exhausted. The Court was not to supplant but to succeed diplomacy, and only when diplomacy had been tried and found wanting.

The next article enumerated the categories of cases in which nation could sue nation as in an ordinary court of justice without a special permission, or *compromis* as it is called in arbitration. This enumeration was that of a group of British publicists of which the late Lord Bryce was head. It was taken up by Mr. Root, and contained in a series of amendments to the Covenant which he prepared. The Department of State asked Mr. Root for them; and they were sent, by the Department, to the American Commission to the Paris Peace Conference; and the Bryce-Root statement was thereupon inserted in Article 13 of the Covenant. The final clause of the list of categories was added by the Advisory Committee of Jurists. Together they formed the compulsory jurisdiction of the Court which by Article 34 of the plan was to hear and determine cases of a legal nature concerning:

(a) The interpretation of a treaty;

(b) Any question of international law;

(c) The existence of any fact which, if established, would constitute a breach of an international obligation;

(d) The nature or extent of reparation to be made for the breach of an international obligation;

(e) The interpretation of a sentence passed by the court.

This was to be the minimum jurisdiction by general agreement of all Parties. A larger competence was foreseen and provided; for the Court was to take "cognizance of all disputes of any kind" to be submitted to it by a general or special agreement of the parties in dispute. This entire article the Assembly of the League rejected; but it is in the Statute as an optional article, which the parties to it may accept generally or under conditions with all or any of the

other contracting parties.[18] No large power has as yet accepted unequivocally the alternative procedure. Many of the smaller States have; but this was to be expected, as they do not shun but court justice.

It is a great pity that this article was sacrificed; for it would have bridged over the gulf between arbitration and judicial settlement. In arbitration, the nations exchange case and counter-case and reply. They state the case and the Tribunal decides the case as stated. In a Court, the plaintiff files his declaration or bill, and the defendant his answer. Upon the pleadings, the Court frames the case which it decides. In this respect, the large nations apparently preferred the Arbitral Tribunal to the Court of Justice.

Article 35 of the plan had a better fate, as it is retained in the Statute. It is of very great importance, for it states the sources of the law and the order in which they are to be applied:

(1) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(2) International custom, as evidence of a general practice, which is accepted as law;

(3) The general principles of law recognized by civilized nations;

(4) Judicial decisions and the views of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Unfortunately, however, the League of Nations added a provision permitting the Court upon the agreement of the parties "to decide a case *ex æquo et bono*." Here again we have arbitration. This is doubly to be regretted, as it is unfair to transfer from the Court of Arbitration provisions which may tend to assure a resort to it.[19]

It does not seem necessary to dwell further upon the

[18] Article 36 of the Statute, Appendix II, No. 8, p. 335.
[19] Article 38 of the Statute, *ibid.*, p. 336.

plan of the jurists or the Statute of the League, other than to say that neither contains, and wisely it is believed, any provision for enforcing the judgment of the Court. Public opinion is, after all, the greatest force in the world; and, sooner or later, the most powerful and headstrong nation bows to its dictates.[20] It is the Supreme Court from which there is no appeal. All the awards of arbitral tribunals for the past century and more have been obeyed under the pressure, it is believed, of an enlightened and insistent international opinion.

In the plan of the Advisory Committee of Jurists, there was an article which permitted the Court to render advisory opinions.[21] That article was eliminated by the Assembly. It is of English origin, and it is not wholly a stranger in America. Let us analyze the article which failed to impress the members of the Assembly. It consists of three paragraphs, by the first of which the Court is authorized to render an advisory opinion "upon any question or dispute of an international nature" which either the Council or the Assembly may refer to it; by the second paragraph the Court is authorized to render its opinion by means of a special commission of from three to five of its members, when the question of an international nature is one which has not as yet arisen between nations; by the

[20] "While by the Constitution the judicial department is recognized as one of the three great branches among which all the powers and functions of the government are distributed, it is inherently the weakest of them all.

"Dependent as its courts are for the enforcement of their judgments upon officers appointed by the executive and removable at his pleasure, with no patronage and no control of the purse or the sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives." Mr. Justice Miller in *United States* v. *Lee,* 106 United States, 196, 223 (1882).

[21] Article 36, Appendix II, No. 7, p. 319.

See James Bradley Thayer, "Memorandum on the Legal Effect of Opinions given by Judges to the Executive and the Legislative under certain American Constitutions," 1885, reprinted under the caption of "Advisory Opinions" in his *Legal Essays* (1908), pp. 42–59; Albert R. Ellingwood, *Departmental Coöperation in State Government* (1918).

third paragraph the Court is authorized to render its opinion upon an existing dispute, and in such a case it acts as a Court and delivers its judgment.

Although shorn of its express power to give advisory opinions, the greatest activity of the Court since its creation has been the preparation of such opinions upon the request of the League of Nations. Formally opened on February 15, 1922, in the first two years of its existence it has been called upon eight times by the League of Nations to render advisory opinions—seven times it has complied; once, it refused—and it has pronounced one judgment between parties litigant.[22]

[22] Advisory opinions have been rendered by the Court on questions Nos. 1, 2, 3, 4, 6, 7, and 8; on No. 5, the majority of the Court held that it was incompetent to give an opinion:

No. 1. *July 31, 1922.* "Was the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference nominated in accordance with the provisions of paragraph 3 of Article 389 of the Treaty of Versailles?"

No. 2. *August 12, 1922.* "Does the competence of the International Labour Organization extend to international regulation of the conditions of labour of persons employed in agriculture?"

No. 3. *August 12, 1922.* "Does examination of proposals for the organization and development of methods of agricultural production, and of other questions of a like character, fall within the competence of the International Labour Organization?"

No. 4. *February 7, 1923.* "Is the dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French zone) on November 8, 1921, and their application to British subjects by international law solely a matter of domestic jurisdiction or not?"

No. 5. *July 23, 1923.* "Do Articles 10 and 11 of the Treaty of Peace between Finland and Russia, signed at Dorpat on October 14th, 1920, and the annexed Declaration of the Russian Delegation regarding the autonomy of Eastern Carelia, constitute engagements of an international character which place Russia under an obligation to Finland as to the carrying out of the provisions contained therein?"

No. 6. *September 10, 1923.* "Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland."

No. 7. *September 15, 1923.* "The question concerning the Acquisition of Polish nationality."

No. 8. *December 6, 1923.* "The delimitation of the Polish-Czechoslovakian Frontier (question of Jaworzina)."

For the texts of these opinions see *Publications of the Permanent Court of International Justice,* Series B, Nos. 1–8.

For the text of the judgment pronounced August 17, 1923, in the case of the *SS. "Wimbledon,"* see *ibid.,* Series A, No. 1.

Since these lectures were delivered the Court has rendered four judgments and two advisory opinions, to wit:

HAGUE TRIBUNAL AND PERMANENT COURT

Let me make some observations upon the condition of affairs since the creation of the Permanent Court of Arbitration and the Permanent Court of International Justice, both of which beneficent institutions are installed in the Peace Palace of The Hague, making of that little city the judicial centre of the world of our day. Each of these is due to American initiative, and the Palace in which they are housed is the gift of Andrew Carnegie.

Before the First Peace Conference of 1899, nations could resort to arbitration. They had done so with increasing frequency since the Jay Treaty of 1794; they had at hand the procedure developed in the course of the century; and they needed only the will to arbitrate in order to settle their disputes of a legal, and even of a political nature. But there is a difference between a series of treaties to each of which only two nations are parties—even although a large number of nations in pairs have concluded treaties to the same effect—and a single treaty to which the same nations are all parties together, thereby transforming the individual obligations into an international duty. The creation of a panel of judges, the general adoption of rules of procedure, and the location of the tribunal in a given city, internationalize the obligation, impress the judges with

Judgments:

No. 2. *August 30, 1924.* Case of the Mavrommatis Palestine Concessions. *The Government of the Greek Republic* v. *The Government of His Britannic Majesty.*

No. 3. *September 12.* Interpretation of Paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly between the Government of His Majesty the King of the Bulgars and the Government of the Greek Republic.

No. 4. *March, 1925.* Regarding Greek request for an authoritative interpretation of judgment No. 3 concerning the Greco-Bulgarian dispute.

No. 5. *March 26, 1925.* Concerning the Mavrommatis Jerusalem Concessions reserved by the Court in its earlier decision No. 2.

Advisory Opinions:

No. 9. *September 4, 1924.* Regarding the delimitation of the Serbo-Albanian Frontier at the Monastery of Saint-Naoum.

No. 10. *February 21, 1925.* Regarding the meaning and scope to be attributed to the word "established" in Article 2 of the Convention of Lausanne of January 30, 1923, regarding the exchange of Greek and Turkish populations.

For the texts see *Publications of the Permanent Court of International Justice,* Series A, Nos. 2, 3, 4, and 5; *ibid.,* Series B, Nos. 9 and 10.

"the international mind," and raise the method to the rank and dignity of an international institute. In a word, the First Conference of 1899 internationalized arbitration. The movement for a permanent Court of Justice, inaugurated at the Second Conference of 1907 and completed by the Advisory Committee of Jurists in 1920, made of judicial settlement an international institute; and the establishment of the Court in the succeeding year internationalized justice. Even he who runs may read it in the name of the Permanent Court of International Justice. There are many reasons which facilitate the resort to peaceful settlement. The Permanent Court of Arbitration and the Permanent Court of Justice are two reasons which render it difficult to reject peaceful settlement and to resort to arms.

I have spoken of the Court of Arbitration and of the Court of Justice as two separate bodies. In fact, they are but one, or rather two branches of a completed system. The Court of Arbitration is equitable; the Court of Justice is legal; and perhaps some day cases between nations will be filed in the Secretary General's Office at The Hague and referred, as of course, to one or other branch of the international judiciary.

Although there are many who believe that arbitration has always been a judicial remedy, there are others who, on the contrary, believe that arbitration is but the continuance of a diplomatic process, and that, when direct negotiation has failed to adjust a difficulty, it is transferred to a tribunal of the parties' choice, in which they are represented, in order that the compromise which diplomacy has failed to produce may be secured. The partisans of arbitration are inclined at the same time, to belittle judicial settlement and the services which a court of justice can render in disputes between nations. They say that legal differences do not result in war, and that sooner or later such differences will be adjusted — whereas disputes of a

political nature, resulting in war, are not susceptible of legal decision; otherwise, they would be decided by rules of law, with which both sides are familiar. There is perhaps something in these contentions; and, under the circumstances, it would seem to be the part of wisdom—while adding the Court of Justice—to preserve the Court of Arbitration; for their very difference is the reason of their usefulness. If political disputes can be submitted to a tribunal of arbiters and got out of the way, then the settlement of a single controversy of this nature which threatens the friendly relations of nations, is a justification of the institution. Disputes of a legal nature, on the other hand, should not be compromised; therefore, they should not be submitted to a mixed commission or a tribunal of arbiters, for such a body is inclined to compromise. They should be reserved for and submitted to a court of justice in the technical sense of the word. Each alone is an assurance of peace; both are the double assurance of which I have so frequently spoken. The Court of Justice alone is not sufficient.

There is another reason why, although the Court of Justice has been added, the Court of Arbitration should be preserved. The European conception of arbitration seems to be to get the dispute settled—at least this was the view of the late Frederic de Martens, the distinguished Russian jurist, who expressed an opinion to this effect on more than one occasion in the Peace Conference at The Hague.[23] The great drawback to arbitration is, at the same time, one of its advantages. Ordinarily, an agreement to submit a dispute to arbitration is made after diplomacy has failed to adjust it. The relations between the countries

[23] He was even opposed to an appeal from an arbitral award, on the ground that the parties had bound themselves in advance to abide by the decision, and that opening it up was in effect renewing the quarrel. This is peculiarly true in political questions, often to be compromised or settled on the principle of give and take. In such a case, there is really no ground for appeal.

are strained, if the controversy is important — and unless it does have a certain importance, it is not submitted to arbitration. In this atmosphere of discontent, if not bitterness, nations which have failed to adjust the dispute are called upon to agree upon the choice of arbiters, and the question to be submitted; that is to say, they are required to agree at the very time that they disagree. The situation would be different if there were a body of arbiters chosen in advance, to whom the case could be referred. This, however, is not the case. So much for the drawback. On the other hand, the fact that the countries are free to select the arbiters qualified in their opinion to settle the dispute upon the basis of respect for law, if not in strict accordance with its principles, renders them, it would seem, more inclined to resort to arbitration. An amendment to the Pacific Settlement Convention made by the Second Hague Peace Conference of 1907 has greatly lessened the defects which at one time appeared to be inherent in the system.[24] When each of the contending parties could appoint two arbiters from its own country, it was to be feared that the decision would be in effect that of the umpire, and that each party in controversy would have two sets of advocates—one off, and the other on the bench. The amendment in the Pacific Settlement Convention of 1907, while allowing each party to nominate two arbiters, required that one of these should be from a third country, with the result that there would then be a majority of the tribunal composed of strangers to the conflict, as the umpire is invariably chosen from a third country. The difficulty, therefore, in selecting the arbiters after the failure of diplomacy, is offset by the advantage accruing from arbiters chosen with reference to the dispute, possessing the confidence of the parties at the time of submission, with the assurance to each contestant, that the

[24] Article 45, Appendix II, No. 4, pp. 284–285.

decision lies not merely in arbiters of their own choice, but in the hands of those arbiters chosen from friendly but not interested countries.

The advantages of arbitration would be the defects of judicial settlement. The judges are not the choice of the contending nations after the dispute has arisen; they are not selected with reference to any dispute. They are chosen in advance of the dispute's being brought before them. They are indifferent to it. An element of arbitration, which is supposed to render the award acceptable, is compromise. The presence of compromise in a judgment is a dereliction of duty on the part of the judges. They are sworn to administer law; to ascertain after argument its existence; and, once found, to apply it. It is not enough that they decide on the basis of respect of law. They are to decide according to law. Therefore, only legal questions should be submitted to a court of justice; and it is, in my opinion, a very grave defect, as I have ventured to point out, in the present Statute of the Permanent Court of International Justice, that the parties to a controversy may by consent vest the court with the duty of deciding *ex æquo et bono*. It is a confusion of functions. It is to make of the judge an arbiter. And the moment that he becomes an arbiter, he ceases to be a judge. It is in the interest of peaceful settlement that the function of each be kept separate; and, while it may be required of arbiters that they decide according to law, judges should not be permitted to acquire the habit of deciding according to equity and good conscience. However valuable the Court of Justice, there is still need of the Court of Arbitration.

But, whether it be a Court of Justice or a Court of Arbitration, what of the law to be applied? To render an award upon the basis of respect for law, or to decide a case according to a rule of law, means, of course, that the law is at hand; for it is as difficult to respect a non-existing

thing as to decide according to it. The law is a *desideratum*, and as States are unwilling to entrust the making of it to arbitral tribunals or to courts of justice, it must be made, if made at all, by other agencies. And it is here that the opinion of Mr. Justice Baldwin, in the controversy between Rhode Island and Massachusetts, comes to our aid. By the agreement to submit a controversy to a court, it is made a judicial question, even although it has been heretofore considered political. But if the law does not exist — what then? The prerequisite to judicial settlement is a court in being, with the law to be applied. The law must therefore be at hand. It may be created in two ways — either before the dispute arises, in a series of conferences, such as those held at The Hague, or after the controversy, by the agreement of the parties upon rules of law to be observed in the decision of the case, as in the *Alabama Claims*, where Great Britain and the United States agreed upon the so-called Three Rules of Washington, and agreed to submit them to, and to request the approval of, the nations at large, in order that they might be accepted as law. They were submitted and approved; and they are to be found in their entirety in the Convention of the Second Hague Conference relating to the rights and duties of neutral powers in maritime war. The creation in advance of the dispute is preferable, inasmuch as the law is then devised with a certain degree of impartiality, as the controversy to which it is to apply does not exist.

It seems, therefore, highly desirable that the nations should recur to the system of Conferences inaugurated before the War. Two of these Conferences have been held at The Hague. A third was in preparation, but its meeting was prevented by the outbreak of war. In the opinion of its advocates, it was postponed to a more propitious time; relegated to an indefinite future in the minds of those who,

in search of the new, have overlooked the experience of the past.

The Advisory Commission of Jurists, meeting at The Hague in 1920 in order to draft the plan for a Court of International Justice, recognized the need of successive additions to the rules of international law to be made by the nations in conference. They therefore recommended a new conference, to be followed by a series of them, in continuation of the first two conferences at The Hague. This was to be held as soon as practicable, and for the purposes set forth by the masterly hand of Mr. Root, to restate and amend, reconcile and clarify, extend and advance, the rules of international law, which are indispensable to the permanent establishment and the successful administration of justice between and among nations.[25]

Sometime the world must take up the work interrupted by the World War; and the sooner this happens, the better it will be for the peaceful settlement of international disputes. If it be thought better not to hold the Conferences in The Hague, where the judicial institutions of the world are centered, or in Geneva, which is at present a storm-center of international politics, there is no reason why they should not be held in some place equally agreeable to London and to Paris. The important thing is that they be held, and be held at a center attractive in itself, and which possesses the confidence of the world at large.

With the Permanent Court of Arbitration at The Hague to decide political questions according to the dictates of political equity, with an International Court of Justice at The Hague to decide according to the law, and with Conferences meeting at regular intervals elsewhere, there would be a court of equity, a court of justice, and a law-making body adequate to the needs of the nations as they present themselves from time to time.

[25] For the exact text of Mr. Root's resolutions, see Appendix III, No. I, pp. 343–344.

What of the Court of Arbitration? What of the Permanent Court of International Justice? The future of the Permanent Court of Arbitration can not be predicted with any degree of certainty, inasmuch as there may well be cases in which the political element predominates, in which the nations in controversy will prefer a temporary tribunal composed for the disposition of the case by judges of their own choice, rather than a resort in such matters to a Permanent Court of International Justice applying strict principles of law, by a permanent panel of judges appointed before and without any reference to the event. It may, indeed, be maintained that there is a legal element in every political case, and that this legal element should be passed upon by a court of justice, rather than by a tribunal of arbitration. This may be so. But if the question has assumed a political, far transcending its legal, importance, nations may prefer arbitration to legal decision. And it is fortunate that the machinery for such a tribunal is in existence, that its members may be selected by an easy method, and that the procedure is at hand in the form of a code for application. The use of the tribunal is merely a question of good will, for the *Alabama Claims* show that the most difficult and intricate cases which have assumed a political importance, can be adjusted to the satisfaction of the nations in controversy, if they are submitted to a tribunal to apply the law which exists, or the rules of law created for the occasion. The will is everything, and in the progress of time, the will, it is to be hoped, may not be wanting.

The future of the Permanent Court of International Justice is assured. It will be doubly assured—to use again the expression which I have employed on numerous occasions—if a means should be found to overcome the obstacles which seem, to some advocates of judicial settlement, to "block" the entrance of the United States.

The nations of the world appear to predicate the existence of the Court upon the participation of the United States. This is ascribing too great importance to the presence of our country, but there can be no doubt that it would be conducive to the stability of the Court, and would enhance its prestige. If that were accomplished, and if the plan of the Advisory Committee were restored, there would indeed be a Permanent Court of International Justice at The Hague, as competent, I veritably believe, to administer justice between and among the nations, as the Supreme Court of the United States to administer justice between and among the States of the American Union. And I would venture the prediction that one would be as permanent as the other; because each is indispensable.

Why have we Americans stood for arbitration and for judicial settlement from the first days of our national existence, and why did the first two instruments of government contain a confession of faith in their efficacy—the Articles of Confederation, proclaiming the arbitration of disputes between the Sovereign States of the imperfect Union; and the Constitution, proclaiming the judicial settlement of controversies between the States of the more perfect Union?

Because, as Mr. Justice Miller said in behalf of the Supreme Court in the case of *United States* v. *Lee*, setting aside the confiscation of Arlington, the estate of Robert E. Lee, during the passion of the Civil War, "No man in this country is so high that he is above the law. . . . It is the only supreme power in our system of Government."[26]

Because, as Elihu Root has said:

> The extraordinary scope of judicial power in this country has accustomed us to see the operations of government and questions arising between sovereign states submitted to judges who apply the test of

[26] *United States* v. *Lee*, 106 United States, 196, 220 (1882).

conformity to established principles and rules of conduct embodied in our constitutions.

Because, as he continued,

It seems natural and proper to us that the conduct of government affecting substantial rights, and not depending upon questions of policy, should be passed upon by the courts when occasion arises.

Because, as he concluded,

It is easy, therefore, for Americans to grasp the idea that the same method of settlement should be applied to questions growing out of the conduct of nations and not involving questions of policy.[27]

Because, in a single phrase, we are, Nation and State, "a Government of Laws and not of men."

[27] Extract from letter to the first meeting of the American Society for the Judicial Settlement of International Disputes. *Addresses on International Subjects* by Elihu Root (1916), p. 151 note.

APPENDICES

APPENDIX I: No. 1

A DECLARATION *of* RIGHTS *made by the representatives of the good people of* Virginia, *assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government.*[1]

[*Unanimously adopted June* 12, 1776.]

1. THAT all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

3. That government is, or ought to be, instituted for the common benefit, protection, and security, of the people, nation, or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration; and that whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the publick weal.

[1] *Proceedings of the Convention of delegates, held at the Capitol, in the City of Williamsburg, in the Colony of Virginia,* on Monday, the 6th of May, 1776 (1776), pp. 100–103.

4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge, to be hereditary.

5. That the legislative and executive powers of the state should be separate and distinct from the judicative; and that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for publick uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the publick good.

7. That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived

of his liberty except by the law of the land, or the judgment of his peers.

9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

10. That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick governments.

13. That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

14. That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of *Virginia*, ought to be erected or established within the limits thereof.

15. That no free government, or the blessing of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

16. That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the

free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.

APPENDIX I: No. 2

Extract from
THE DECLARATION OF INDEPENDENCE
1776[1]

In Congress, July 4, 1776
The Unanimous Declaration of the Thirteen United States of America

WHEN in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.—We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind

[1] Printed from the facsimile of the engrossed copy of the original manuscript in the Library of the Department of State of the United States.

are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.— Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. . . .

We, Therefore, the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.— And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

APPENDIX I: No. 3

The Declaration of Rights, which has been agreed to by the National Assembly of France, and sanctioned by the King, and which forms the Basis of the new Constitution of France. August 26, 1789.[1]

The representatives of the people of France, formed into a national assembly, considering that ignorance, neglect, or contempt of human rights, are the sole causes of public misfortunes and corruptions of government, have resolved to set forth, in a solemn declaration, these natural, imperscriptible, and unalienable, rights: that this declaration being constantly present to the minds of the members of the body social, they may ever be kept attentive to their rights and their duties: that the acts of the legislative and executive powers of government being capable of being every moment compared with the end of political institutions, may be more respected; and also, that the future claims of the citizens, being directed by simple and incontestible principles, may always tend to the maintenance of the constitution, and the general happiness.

For these reasons the national assembly doth recognize and declare, in that presence of the Supreme Being, and with the hope of his blessing and favour, the following sacred rights of men and of citizens.

I. Men were born and always continue free, and equal in respect of their rights. Civil distinctions, therefore, can be founded only on public utility.

II. The end of all political associations is the preservation of the natural and imperscriptible rights of man; and

[1] This translation is printed from *The Annual Register, or a View of the History, Politics, and Literature, for the Year 1789* (the second edition, London, 1802), pp. 332–333.

these rights are liberty, property, security, and resistance of oppression.

III. The nation is essentially the source of all sovereignty; nor can any individual, or any body of men, be entitled to any authority which is not expressly derived from it.

IV. Political liberty consists in the power of doing whatever does not injure another. The exercise of the natural rights of every man, has no other limits than those which are necessary to secure to every other man the free exercise of the same rights; and these limits are determinable only by the law.

V. The law ought to prohibit only actions hurtful to society. What is not prohibited by the law should not be hindered; nor should any one be compelled to that which the law does not require.

VI. The law is an expression of the will of the community. All citizens have a right to concur, either personally or by their representatives, in its formation. It should be the same to all, whether it protects or punishes; and all being equal in its sight, are equally eligible to all honours, places, and employments, according to their different abilities, without any other distinction than that created by their virtues and talents.

VII. No man should be accused, arrested, or held in confinement, except in cases determined by the law, and according to the forms which it has prescribed. All who promote, solicit, execute, or cause to be executed, arbitrary orders, ought to be punished: and every citizen called upon or apprehended by virtue of the law, ought immediately to obey, and renders himself culpable by resistance.

VIII. The law ought to impose no other penalties than such as are absolutely and evidently necessary; and no one ought to be punished but in virtue of a law promulgated before the offence, and legally applied.

IX. Every man being presumed innocent till he has been convicted, whenever his detention becomes indispensable, all rigour to him, more than is necessary to secure his person, ought to be provided against by the law.

X. No man ought to be molested on account of his opinions, not even on account of his religious opinions, provided his avowal of them does not disturb the public order established by the law.

XI. The unrestrained communication of thoughts and opinions being one of the most precious rights of man, every citizen may speak, write, and publish freely, provided he is responsible for the abuse of this liberty in cases determined by the law.

XII. A public force being necessary to give security to the rights of men and of citizens, that force is instituted for the benefit of the community, and not for the particular benefit of the persons to whom it is intrusted.

XIII. A common contribution being necessary for the support of the public force, and for defraying the other expenses of government, it ought to be divided equally among the members of the community, according to their abilities.

XIV. Every citizen has a right, either by himself or his representative, to a free voice in determining the necessity of public contributions, the appropriation of them, and their amount, mode of assessment, and duration.

XV. Every community has a right to demand, of all its agents, an account of their conduct.

XVI. Every community in which a separation of powers and a security of rights is not provided for, wants a constitution.

XVII. The right to property being inviolable and sacred, no one ought to be deprived of it, except in cases of evident public necessity legally ascertained, and on condition of a previous just indemnity.

APPENDIX II: No. 1
ARTICLES OF CONFEDERATION[1]
March 1, 1781

Article IX. The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the united states shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of congress shall be appointed a judge of any of the said courts.

The united states in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any state in controversy

[1] Worthington Ford, *Journals of the Continental Congress*, Library of Congress edition, vol. XIX (1912), p. 214.

with another shall present a petition to congress stating the matter in question and praying for a hearing, notice thereof shall be given by order of congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, congress shall name three persons out of each of the united states, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as congress shall direct, shall in the presence of congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which congress shall judge sufficient, or being present shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to congress, and lodged among the acts of congress for the security of the parties concerned: provided that every commissioner,

before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the state, where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also, that no state shall be deprived of territory for the benefit of the united states.

All controversies concerning the private right of soil claimed under different grants of two or more states, whose jurisdictions as they may respect such lands, and the states which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the congress of the united states, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states. . . .

APPENDIX II: No. 2

THE CONSTITUTION OF THE UNITED STATES[1]

1787

Article III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall

[1] Printed from engrossed Constitution as signed.

have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in Open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

APPENDIX II: No. 3

CONTROVERSIES BETWEEN STATES AND BETWEEN STATES AND THE UNITED STATES WHICH HAVE BEEN BROUGHT BEFORE THE SUPREME COURT

New York v. Connecticut (boundary)	(1799)	4	Dallas	1
	(1799)	4	Dallas	3
	(1799)	4	Dallas	6
New Jersey v. New York (boundary)	(1830)	3	Peters	461
	(1831)	5	Peters	284
	(1832)	6	Peters	323
Rhode Island v. Massachusetts (boundary)	(1833)	7	Peters	651
	(1837)	11	Peters	226
	(1838)	12	Peters	657
	(1838)	12	Peters	755
	(1839)	13	Peters	23
	(1840)	14	Peters	210
	(1841)	15	Peters	233
First final decision	(1846)	4	Howard	591
Maryland v. Virginia (boundary)	(1835)	217	U. S.	32
Missouri v. Iowa (boundary)	(1849)	7	Howard	660
	(1850)	10	Howard	1
	(1896)	160	U. S.	688
	(1897)	165	U. S.	118
Florida v. Georgia (boundary)	(1850)	11	Howard	293
	(1854)	17	Howard	478
Alabama v. Georgia (boundary)	(1860)	23	Howard	509
Kentucky v. Dennison, Gov. of Ohio (extradition; execution of judgment)	(1861)	24	Howard	66
Virginia v. West Virginia (boundary)	(1871)	11	Wallace	39
Missouri v. Kentucky (boundary)	(1871)	11	Wallace	395
So. Carolina v. Georgia (diversion of water)	(1876)	93	U. S.	4
New Hampshire v. Louisiana (State bonds)	(1883)	108	U. S.	76
New York v. Louisiana (State bonds)	(1883)	108	U. S.	76
United States v. Louisiana (proceeds of land sales)	(1887)	123	U. S.	32
	(1888)	127	U. S.	182

United States v. Alabama (proceeds of land sales)	(1887) 123	U. S.	39
United States v. Mississippi (proceeds of land sales)	(1887) 123	U. S.	39
United States v. North Carolina (State bonds)	(1890) 136	U. S.	211
Indiana v. Kentucky (boundary)	(1890) 136	U. S.	479
	(1895) 159	U. S.	275
	(1896) 163	U. S.	520
	(1897) 167	U. S.	270
Nebraska v. Iowa (boundary)	(1892) 143	U. S.	359
	(1892) 145	U. S.	519
United States v. Texas (boundary)	(1892) 143	U. S.	621
	(1896) 162	U. S.	1
Iowa v. Illinois (boundary)	(1893) 147	U. S.	1
	(1894) 151	U. S.	238
	(1906) 202	U. S.	59
Indiana v. United States (proceeds of land sales)	(1893) 148	U. S.	148
Virginia v. Tennessee (boundary)	(1893) 148	U. S.	503
	(1895) 158	U. S.	267
	(1900) 177	U. S.	501
	(1903) 190	U. S.	64
United States v. New York (money spent on federal troops)	(1896) 160	U. S.	598
Louisiana v. Texas (quarantine)	(1900) 176	U. S.	1
Missouri v. Illinois (sanitation)	(1901) 180	U. S.	208
	(1906) 200	U. S.	496
	(1906) 202	U. S.	598
Kansas v. Colorado (diversion of water)	(1902) 185	U. S.	125
	(1907) 206	U. S.	46
United States v. Michigan (proceeds of land sales)	(1903) 190	U. S.	379
	(1906) 203	U. S.	601
South Dakota v. North Carolina (State bonds)	(1904) 192	U. S.	286
Missouri v. Nebraska (boundary)	(1904) 196	U. S.	23
	(1905) 197	U. S.	577
South Carolina v. United States (taxation)	(1905) 199	U. S.	437
Louisiana v. Mississippi (jurisdiction over oyster beds)	(1906) 202	U. S.	1
Kansas v. United States (land grants)	(1907) 204	U. S.	331

Virginia v. West Virginia (State debt; execution of judgment)	(1907) 206	U. S.	290
	(1908) 209	U. S.	514
	(1911) 220	U. S.	1
	(1911) 222	U. S.	17
	(1913) 231	U. S.	89
	(1914) 234	U. S.	117
	(1915) 238	U. S.	202
	(1916) 241	U. S.	531
	(1918) 246	U. S.	565
Washington v. Oregon (boundary)	(1908) 211	U. S.	127
	(1909) 214	U. S.	205
Missouri v. Kansas (boundary)	(1909) 213	U. S.	78
Maryland v. West Virginia (boundary)	(1910) 217	U. S.	1
	(1910) 217	U. S.	577
	(1912) 225	U. S.	1
North Carolina v. Tennessee (boundary)	(1914) 235	U. S.	1
	(1916) 240	U. S.	652
Arkansas v. Tennessee (boundary)	(1918) 246	U. S.	158
	(1918) 247	U. S.	461
	(1919) 249	U. S.	588
New York v. New Jersey, et al. (pollution of waters)	(1919) 249	U. S.	202
	(1921) 256	U. S.	296
Arkansas v. Mississippi (boundary)	(1919) 250	U. S.	39
	(1920) 252	U. S.	344
	(1921) 256	U. S.	28
Minnesota v. Wisconsin (boundary)	(1920) 252	U. S.	273
	(1920) 254	U. S.	14
	(1922) 258	U. S.	149
Oklahoma v. Texas (boundary)	(1920) 252	U. S.	372
	(1920) 253	U. S.	465
	(1920) 254	U. S.	280
	(1920) 254	U. S.	609
	(1920) 254	U. S.	615
	(1921) 254	U. S.	603
	(1921) 256	U. S.	70
	(1921) 256	U. S.	602
	(1921) 257	U. S.	308
	(1921) 257	U. S.	609

	(1921) 257	U. S.	611
	(1921) 257	U. S.	616
	(1922) 257	U. S.	621
	(1922) 258	U. S.	574
	(1922) 258	U. S.	606
	(1922) 259	U. S.	565
	(1922) 260	U. S.	705
	(1923) 260	U S.	606
	(1923) 260	U. S.	711
	(1923) 261	U. S.	340
	(1923) 261	U. S.	345
	(1923) 261	U. S.	606
	(1923) 262	U. S.	505
	(1923) 262	U. S.	724
	(1923) 263	U. S.	681
	(1924) 264	U. S.	565
	(1924) 265	U. S.	490
	(1924) 265	U. S.	493
	(1924) 265	U. S.	500
	(1924) 265	U. S.	505
	(1924) 265	U. S.	513
	(1924) 265	U. S.	573
	(1924) 265	U. S.	573
	(1924) 266	U. S.	298
	(1924) 266	U. S.	303
	(1924) 266	U. S.	583
	(1925) 266	U. S.	546
Pennsylvania v. West Virginia (interstate gas pipe-lines)	(1920) 252	U. S.	563
Ohio v. West Virginia	(1922) 257	U S.	620
	(1923) 262	U. S.	553
	(1923) 262	U. S.	623
	(1923) 263	U. S.	350
	(1923) 263	U. S.	671
Georgia v. South Carolina (boundary)	(1920) 253	U. S.	477
	(1922) 257	U. S.	516
	(1922) 259	U. S.	572
North Dakota v. Minnesota (diversion of waters)	(1921) 256	U. S.	220
	(1923) 263	U. S.	365

	(1924) 263	U. S.	583
Wyoming v. Colorado, et al. (diversion of waters)	(1922) 259	U. S.	419
	(1922) 259	U. S.	496
	(1922) 260	U. S.	1
New York, et al. v. United States (intra-state commerce)	(1922) 257	U. S.	591
United States v. Oklahoma (priority of U. S. claims)	(1923) 261	U. S.	253
	(1923) 262	U. S.	734
New Mexico v. Texas	(1924) 264	U. S.	574
	(1924) 266	U. S.	586
United States v. Washington	(1924) 266	U. S.	579

APPENDIX II: No. 4

The Hague Conventions of 1899[1] and 1907[2] for the Pacific Settlement of International Disputes.

His Majesty the German Emperor, King of Prussia; [etc.]:

Animated by the sincere desire to work for the maintenance of general peace;

Resolved to promote by all the efforts in their power the friendly settlement of international disputes;

Recognizing the solidarity uniting the members of the society of civilized nations;

Desirous of extending the empire of law and of strengthening the appreciation of international justice;

Convinced that the permanent institution of a tribunal of arbitration, accessible to all, in the midst of independent Powers, will contribute effectively to this result;

Having regard to the advantages attending the general and regular organization of the procedure of arbitration;

Sharing the opinion of the august initiator of the International Peace Conference that it is expedient to record in an international agreement the principles of equity and right on which are based the security of States and the welfare of peoples;

Being desirous, *with this object, of insuring the better working in practice of commissions of inquiry and tribunals of arbitration, and of facilitating recourse to arbitration in cases which allow of a summary procedure;*

Have deemed it necessary to revise in certain particu-

[1] 32 *Statutes at Large*, pp. 1779–1802.

[2] 36 *Ibid.*, 2199–2240.

The text of the Convention here printed is that of the Second Peace Conference at The Hague, 1907. It is a revision of the original text of the First Hague Conference. Changes in the revision of the first text are indicated by italics, and the number in brackets at the beginning of each article is that of the 1899 Convention.

lars and to complete the work of the First Peace Conference for the pacific settlement of international disputes;

The high contracting Parties have resolved to conclude a *new* Convention for this purpose, *and* have appointed the following as their plenipotentiaries:

[Here follow the names of plenipotentiaries.]

Who, after having *deposited* their full powers, found in good and due form, have agreed upon the following:

Part I.—The Maintenance of General Peace

Article 1

With a view to obviating as far as possible recourse to force in the relations between States, the *contracting* Powers agree to use their best efforts to insure the pacific settlement of international differences.

Part II.—Good Offices and Mediation

Article 2

In case of serious disagreement or dispute, before an appeal to arms, the *contracting* Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

Article 3

Independently of this recourse, the *contracting* Powers deem it expedient *and desirable* that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities.

The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

ARTICLE 4

The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

ARTICLE 5

The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

ARTICLE 6

Good offices and mediation undertaken either at the request of the parties in dispute or on the initiative of Powers strangers to the dispute have exclusively the character of advice, and never have binding force.

ARTICLE 7

The acceptance of mediation can not, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If it takes place after the commencement of hostilities, the military operations in progress are not interrupted in the absence of an agreement to the contrary.

ARTICLE 8

The *contracting* Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:

In case of a serious difference endangering peace, the States at variance choose respectively a Power, to which they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, can not exceed thirty days, the States in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, which must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

Part III.—International Commissions of Inquiry

Article 9

In disputes of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the *contracting* Powers deem it expedient *and desirable* that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

Article 10

International commissions of inquiry are constituted by special agreement between the parties in dispute.

The inquiry convention defines the facts to be examined; *it determines the mode and time in which the commission is to be formed* and the extent of the powers of the commissioners.

It also determines, if there is need, where the commission is to sit, and whether it may remove to another place, the language the commission shall use and the languages the use of which shall be authorized before it, as well as the date on which each party must deposit its statement of

as well as the list of witnesses and experts whose evidence it wishes to be heard.

ARTICLE 20

The commission is entitled, with the assent of the Powers, to move temporarily to any place where it considers it may be useful to have recourse to this means of inquiry or to send one or more of its members. Permission must be obtained from the State on whose territory it is proposed to hold the inquiry.

ARTICLE 21

Every investigation, and every examination of a locality, must be made in the presence of the agents and counsel of the parties or after they have been duly summoned.

ARTICLE 22

The commission is entitled to ask from either party for such explanations and information as it considers necessary.

ARTICLE 23[12]

The *parties* undertake to supply the commission of inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to become completely acquainted with, and to accurately understand, the facts in question.

They undertake to make use of the means at their disposal, under their municipal law, to insure the appearance of the witnesses or experts who are in their territory and have been summoned before the commission.

If the witnesses or experts are unable to appear before the commission, the parties will arrange for their evidence to be taken before the qualified officials of their own country.

ARTICLE 24

For all notices to be served by the commission in the

territory of a third contracting Power, the commission shall apply direct to the Government of the said Power. The same rule applies in the case of steps being taken on the spot to procure evidence.

The requests for this purpose are to be executed so far as the means at the disposal of the Power applied to under its municipal law allow. They can not be rejected unless the Power in question considers they are calculated to impair its sovereign rights or its safety.

The commission will equally be always entitled to act through the Power on whose territory it sits.

Article 25

The witnesses and experts are summoned on the request of the parties or by the commission of its own motion, and, in every case, through the Government of the State in whose territory they are.

The witnesses are heard in succession and separately, in the presence of the agents and counsel, and in the order fixed by the commission.

Article 26

The examination of witnesses is conducted by the president.

The members of the commission may however put to each witness questions which they consider likely to throw light on and complete his evidence, or get information on any point concerning the witness within the limits of what is necessary in order to get at the truth.

The agents and counsel of the parties may not interrupt the witness when he is making his statement, nor put any direct question to him, but they may ask the president to put such additional questions to the witness as they think expedient.

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The commission is entitled, with the assent of the Powers, to move temporarily to any place where it considers it may be useful to have recourse to this means of inquiry or to send one or more of its members. Permission must be obtained from the State on whose territory it is proposed to hold the inquiry.

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The agents and counsel of the parties may not interrupt the witness when he is making his statement, nor put any direct question to him, but they may ask the president to put such additional questions to the witness as they think expedient.

Article 27

The witness must give his evidence without being allowed to read any written draft. He may, however, be permitted by the president to consult notes or documents if the nature of the facts referred to necessitates their employment.

Article 28

A minute of the evidence of the witness is drawn up forthwith and read to the witness. The latter may make such alterations and additions as he thinks necessary, which will be recorded at the end of his statement.

When the whole of his statement has been read to the witness, he is asked to sign it.

Article 29

The agents are authorized, in the course of or at the close of the inquiry, to present in writing to the commission and to the other party such statements, requisitions, or summaries of the facts as they consider useful for ascertaining the truth.

Article 30

The commission considers its decisions in private and the proceedings are secret.

All questions are decided by a majority of the members of the commission.

If a member declines to vote, the fact must be recorded in the minutes.

Article 31

The sittings of the commission are not public, nor the minutes and documents connected with the inquiry published except in virtue of a decision of the commission taken with the consent of the parties.

Article 32

After the parties have presented all the explanations and evidence, and the witnesses have all been heard, the president declares the inquiry terminated, and the commission adjourns to deliberate and to draw up its report.

Article 33[13]

The report is signed by all the members of the commission.

If one of the members refuses to sign, the fact is mentioned; but the validity of the report is not affected.

Article 34

The report of the commission is read at a public sitting, the agents and counsel of the parties being present or duly summoned.

A copy of the report is given to each party.

Article 35[14]

The report of the commission is limited to a statement of facts, and has in no way the character of an award. It leaves to the parties entire freedom as to the effect to be given to the statement.

Article 36

Each party pays its own expenses and an equal share of the expenses incurred by the commission.

Part IV.—International Arbitration

Chapter I.—*The System of Arbitration*

Article 37[15]

International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect to law.

Recourse to arbitration implies an engagement to submit in good faith to the award.

Article 38[16]

In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the *contracting* Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle.

Consequently, it would be desirable that, in disputes about the above-mentioned questions, the contracting Powers should, if the case arose, have recourse to arbitration, in so far as circumstances permit.

Article 39[17]

The arbitration convention is concluded for questions already existing or for questions which may arise eventually.

It may embrace any dispute or only disputes of a certain category.

Article 40[19]

Independently of general or private treaties expressly stipulating recourse to arbitration as obligatory on the *contracting* Powers, the said Powers reserve to themselves the right of concluding new agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may consider it possible to submit to it.

Chapter II.—*The Permanent Court of Arbitration*

Article 41[20]

With the object of facilitating an immediate recourse to arbitration for international differences, which it has

not been possible to settle by diplomacy, the *contracting* Powers undertake to *maintain the* Permanent Court of Arbitration, *as established by the First Peace Conference*, accessible at all times, and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention.

ARTICLE 42[21]

The Permanent Court *is* competent for all arbitration cases, unless the parties agree to institute a special tribunal.

ARTICLE 43[22]

The Permanent Court sits at The Hague.

An International Bureau serves as registry for the Court. It is the channel for communications relative to the meetings of the Court; it has charge of the archives and conducts all the administrative business.

The *contracting* Powers undertake to communicate to the Bureau, *as soon as possible*, a certified copy of any conditions of arbitration arrived at between them and of any award concerning them delivered by a special tribunal.

They likewise undertake to communicate to the Bureau the laws, regulations, and documents eventually showing the execution of the awards given by the Court.

ARTICLE 44[23]

Each *contracting* Power *selects* four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrator.

The persons thus selected *are* inscribed, as members of the Court, in a list which shall be notified to all the *contracting* Powers by the Bureau.

Any alteration in the list of arbitrators is brought by the Bureau to the knowledge of the *contracting* Powers.

Two or more Powers may agree on the selection in common of one or more members.

The same person can be selected by different Powers.

The members of the Court are appointed for a term of six years. These appointments are renewable.

Should a member of the Court die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. *In this case the appointment is made for a fresh period of six years.*

Article 45[24]

When the *contracting* Powers wish to have recourse to the Permanent Court for the settlement of a difference which has arisen between them, the arbitrators called upon to form the tribunal with jurisdiction to decide this difference must be chosen from the general list of members of the Court.

Failing the direct agreement of the parties on the composition of the arbitration tribunal, the following course shall be pursued:

Each party appoints two arbitrators, *of whom one only can be its national or chosen from among the persons selected by it as members of the Permanent Court.* These arbitrators together choose an umpire.

If the votes are equally divided, the choice of the umpire is intrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

If, within two months' time, these two Powers can not come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court, exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots

determines which of the candidates thus presented shall be umpire.

ARTICLE 46

The tribunal being thus composed, the parties notify to the Bureau their determination to have recourse to the Court, *the text of their compromis*, and the names of the arbitrators.

The Bureau communicates without delay to each arbitrator the compromis, and the names of the other members of the tribunal.

The tribunal assembles at the date fixed by the parties. *The Bureau makes the necessary arrangements for the meeting.*

The members of the *tribunal*, in the exercise of their duties and out of their own country, enjoy diplomatic privileges and immunities.

ARTICLE 47[26]

The Bureau is authorized to place its offices and staff at the disposal of the *contracting* Powers for the use of any special board of arbitration.

The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between *non-contracting* Powers or between *contracting* Powers and *non-contracting* Powers, if the parties are agreed on recourse to this tribunal.

ARTICLE 48[27]

The *contracting* Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present Convention, and the advice given to them, in the highest

interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.

In case of dispute between two Powers, one of them can always address to the International Bureau a note containing a declaration that it would be ready to submit the dispute to arbitration.

The Bureau must at once inform the other Power of the declaration.

ARTICLE 49[28]

The Permanent Administrative Council, composed of the diplomatic representatives of the *contracting* Powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as president, is charged with the direction and control of the International Bureau.

The Council *settles* its rules of procedure and all other necessary regulations.

It *decides* all questions of administration which may arise with regard to the operations of the Court.

It *has* entire control over the appointment, suspension, or dismissal of the officials and employes of the Bureau.

It *fixes* the payments and salaries, and controls the general expenditure.

At meetings duly summoned the presence of *nine* members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the *contracting* Powers without delay the regulations adopted by it. It furnishes them with an annual report on the labors of the Court, the working of the administration, and the expenditure. *The report likewise contains a résumé of what is important in the documents communicated to the Bureau by the Powers in virtue of Article 43, paragraphs 3 and 4.*

ARTICLE 50[29]

The expenses of the Bureau shall be borne by the *con-*

tracting Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

The expenses to be charged to the adhering Powers shall be reckoned from the date on which their adhesion comes into force.

Chapter III.—*Arbitration Procedure*

Article 51[30]

With a view to encouraging the development of arbitration, the *contracting* Powers have agreed on the following rules, which are applicable to arbitration procedure, unless other rules have been agreed on by the parties.

Article 52[31]

The Powers which have recourse to arbitration sign a compromis, in which the subject of the dispute is clearly defined, *the time allowed for appointing arbitrators, the form, order, and time in which the communication referred to in Article 63 must be made, and the amount of the sum which each party must deposit in advance to defray the expenses.*

The compromis likewise defines, if there is occasion, the manner of appointing arbitrators, any special powers which may eventually belong to the tribunal, where it shall meet, the language it shall use, and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed.

Article 53

The Permanent Court is competent to settle the compromis, if the parties are agreed to have recourse to it for the purpose.

It is similarly competent, even if the request is only

made by one of the parties, when all attempts to reach an understanding through the diplomatic channel have failed, in the case of—

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, and providing for a compromis in all disputes and not either explicitly or implicitly excluding the settlement of the compromis from the competence of the Court. Recourse can not, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one Power by another Power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the compromis should be settled in some other way.

Article 54

In the cases contemplated in the preceding article, the compromis shall be settled by a commission consisting of five members selected in the manner arranged for in Article 45, paragraphs 3 to 6.

The fifth member is president of the commission ex officio.

Article 55[32]

The duties of arbitrator may be conferred on one arbitrator alone or on several arbitrators selected by the parties as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the present Convention.

Failing the constitution of the tribunal by direct agreement between the parties, the course *referred to in Article 45, paragraphs 3 to 6, is followed.*

Article 56[33]

When a sovereign or the chief of a State is chosen as arbitrator, the arbitration procedure is settled by him.

Article 57[34]

The umpire is president of the tribunal ex officio.

When the tribunal does not include an umpire, it appoints its own president.

Article 58

When the compromis is settled by a commission, as contemplated in Article 54, and in the absence of an agreement to the contrary, the commission itself shall form the arbitration tribunal.

Article 59[35]

Should one of the arbitrators either die, retire, or be unable for any reason whatever to discharge his functions, the same procedure is followed for filling the vacancy as was followed for appointing him.

Article 60[36]

The tribunal sits at The Hague, unless some other place is selected by the parties.

The tribunal can only sit in the territory of a third Power with the latter's consent.

The place of meeting once fixed can not be altered by the tribunal, except with the consent of the parties.

Article 61

If the question as to what languages are to be used has

not been settled by the compromis, it shall be decided by the tribunal.

Article 62[37]

The parties are entitled to appoint special agents to attend the tribunal to act as intermediaries between themselves and the tribunal.

They are further authorized to retain for the defence of their rights and interests before the tribunal counsel or advocates appointed by themselves for this purpose.

The members of the Permanent Court may not act as agents, counsel, or advocates except on behalf of the Power which appointed them members of the Court.

Article 63[39]

As a general rule, arbitration procedure comprises two distinct phases: pleadings and oral discussions.

The pleadings consist in the communication by the respective agents to the members of the tribunal and the opposite party of *cases, counter-cases, and, if necessary, of replies; the parties annex thereto all papers* and documents called for in the case. This communication shall be made *either directly or through the intermediary of the International Bureau*, in the *order* and within the time fixed by the *compromis*.

The time fixed by the compromis may be extended by mutual agreement by the parties, or by the tribunal when the latter considers it necessary for the purpose of reaching a just decision.

The discussions consist in the oral development before the tribunal of the arguments of the parties.

Article 64[40]

A *certified copy* of every document produced by one party must be communicated to the other party.

ARTICLE 65

Unless special circumstances arise, the tribunal does not meet until the pleadings are closed.

ARTICLE 66[41]

The discussions are under the control of the president.

They are only public if it be so decided by the tribunal, with the assent of the parties.

They are recorded in minutes drawn up by the secretaries appointed by the president. These minutes *are signed by the president and by one of the secretaries and* alone have an authentic character.

ARTICLE 67[42]

After the close of the pleadings, the tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party.

ARTICLE 68[43]

The tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties.

In this case, the tribunal has the right to require the production of these papers or documents, but is obliged to make them known to the opposite party.

ARTICLE 69[44]

The tribunal can, besides, require from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal the tribunal takes note of it.

ARTICLE 70[45]

The agents and the counsel of the parties are authorized to present orally to the tribunal all the arguments they may consider expedient in defense of their case.

ARTICLE 71[46]

They are entitled to raise objections and points. The decisions of the tribunal on these points are final and can not form the subject of any subsequent discussion.

ARTICLE 72[47]

The members of the tribunal are entitled to put questions to the agents and counsel of the parties, and to ask them for explanations on doubtful points.

Neither the questions put, nor the remarks made by members of the tribunal in the course of the discussions, can be regarded as an expression of opinion by the tribunal in general or by its members in particular.

ARTICLE 73[48]

The tribunal is authorized to declare its competence in interpreting the compromis, as well as the other treaties [*treaties and conventions*] which may be invoked, and in applying the principles of law.

ARTICLE 74[49]

The tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms, *order*, and time in which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence.

ARTICLE 75

The parties undertake to supply the tribunal, as fully as they consider possible, with all the information required for deciding the case.

ARTICLE 76

For all notices which the tribunal has to serve in the territory of a third contracting Power, the tribunal shall apply direct to the Government of that Power. The same

rule applies in the case of steps being taken to procure evidence on the spot.

The requests for this purpose are to be executed as far as the means at the disposal of the Power applied to under its municipal law allow. They can not be rejected unless the Power in question considers them calculated to impair its own sovereign rights or its safety.

The Court will equally be always entitled to act through the Power on whose territory it sits.

Article 77[50]

When the agents and counsel of the parties have submitted all the explanations and evidence in support of their case the president shall declare the discussion closed.

Article 78[51]

The tribunal considers its decisions in private and *the proceedings remain secret.*

All questions are decided by a majority of the members of the tribunal.

Article 79[52]

The award must give the reasons on which it is based. *It contains the names of the arbitrators; it is signed by the president and registrar or by the secretary acting as registrar.*

Article 80[53]

The award is read out in public sitting, the agents and counsel of the parties being present or duly summoned to attend.

Article 81[54]

The award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal.

Article 82

Any dispute arising between the parties as to the interpretation and execution of the award shall, in the absence of an agreement to the contrary, be submitted to the tribunal which pronounced it.

Article 83[55]

The parties can reserve in the compromis the right to demand the revision of the award.

In this case and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the award and which was unknown to the tribunal and to the party which demanded the revision at the time the discussion was closed.

Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

The compromis fixes the period within which the demand for revision must be made.

Article 84[56]

The award is not binding except on the parties *in dispute.*

When it concerns the interpretation of a Convention to which Powers other than those in dispute are parties, they shall inform all the signatory Powers *in good time.* Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

ARTICLE 85[57]

Each party pays its own expenses and an equal share of the expenses of the tribunal.

CHAPTER IV.—*Arbitration by Summary Procedure*

ARTICLE 86

With a view to facilitating the working of the system of arbitration in disputes admitting of a summary procedure, the contracting Powers adopt the following rules, which shall be observed in the absence of other arrangements and subject to the reservation that the provisions of Chapter III apply so far as may be.

ARTICLE 87

Each of the parties in dispute appoints an arbitrator. The two arbitrators thus selected choose an umpire. If they do not agree on this point, each of them proposes two candidates taken from the general list of the members of the Permanent Court exclusive of the members appointed by either of the parties and not being nationals of either of them; which of the candidates thus proposed shall be the umpire is determined by lot.

The umpire presides over the tribunal, which gives its decisions by a majority of votes.

ARTICLE 88

In the absence of any previous agreement the tribunal, as soon as it is formed, settles the time within which the two parties must submit their respective cases to it.

ARTICLE 89

Each party is represented before the tribunal by an agent, who serves as intermediary between the tribunal and the Government who appointed him.

Article 90

The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and experts should be called. The tribunal has, for its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in Court it may consider useful.

Part V.—Final Provisions

Article 91

The present Convention, duly ratified, shall replace, as between the contracting Powers, the Convention for the pacific settlement of international disputes of the 29th July, 1899.

Article 92[58]

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

The first deposit of ratifications shall be recorded in a procès-verbal signed by the representatives of the Powers which take part therein and by the Netherland Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Netherland Government and accompanied by the instrument of ratification.

A duly certified copy of the procès-verbal relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, and of the instruments of ratification, shall be immediately sent by the Netherland Government, through the diplomatic channel, to the Powers invited to the Second Peace Conference, as well as to those Powers which have adhered to the Convention. In

the cases contemplated in the preceding paragraph, the said Government shall at the same time inform the Powers of the date on which it received the notification.

Article 93[59]

Non-signatory Powers which have been *invited* to the *Second* Peace Conference may adhere to the present Convention.

The Power which desires to adhere notifies its intention in writing to the Netherland Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

This Government shall immediately forward to all the other Powers invited to the Second Peace Conference a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

Article 94[60]

The conditions on which the Powers which have not been *invited to* the *Second* Peace Conference may adhere to the present Convention shall form the subject of a subsequent agreement between the contracting Powers.

Article 95

The present Convention shall take effect, in the case of the Powers which were not a party to the first deposit of ratifications, sixty days after the date of the procès-verbal of this deposit, and, in the case of the Powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherland Government.

Article 96[61]

In the event of one of the contracting *Parties wishing to* denounce the present Convention, *the* denunciation shall

be notified in writing to the Netherland Government, *which shall* immediately communicate *a duly certified copy of* the notification to all the other Powers *informing them of the date on which it was received.*

The denunciation shall only have effect in regard to the notifying Power, *and one year after the notification has reached the Netherland Government.*

ARTICLE 97

A register kept by the Netherland Minister for Foreign Affairs shall give the date of the deposit of ratifications effected in virtue of Article 92, paragraphs 3 and 4, as well as the date on which the notifications of adhesion (Article 93, paragraph 2) or of denunciation (Article 96, paragraph 1) have been received.

Each contracting Power is entitled to have access to this register and to be supplied with duly certified extracts from it.

In faith whereof the plenipotentiaries have *appended their signatures to* the present Convention.

Done at The Hague, the *18th October, 1907*, in a single copy, which shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the contracting Powers.

[Here follow signatures.]

APPENDIX II: No. 5

DRAFT CONVENTION FOR THE CREATION OF A COURT OF ARBITRAL JUSTICE, ADOPTED AND RECOMMENDED TO THE POWERS BY THE SECOND HAGUE PEACE CONFERENCE

October 18, 1907.[1]

PART I.—*Constitution of the Court of Arbitral Justice*

ARTICLE 1

With a view to promoting the cause of arbitration, the contracting Powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Court of Arbitral Justice, of free and easy access, composed of judges representing the various juridical systems of the world, and capable of ensuring continuity in arbitral jurisprudence.

ARTICLE 2

The Court of Arbitral Justice is composed of judges and deputy judges chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the Court are appointed, as far as possible, from the members of the Permanent Court of Arbitration. The appointment shall be made within the six months following the ratification of the present Convention.

[1] *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts* (Carnegie Endowment for International Peace, 1920). The Conference of 1907, vol. I, p. 690.

Article 3

The judges and deputy judges are appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative Council created by the Convention for the pacific settlement of international disputes. Their appointments can be renewed.

Should a judge or deputy die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of twelve years.

Article 4

The judges of the Court of Arbitral Justice are equal, and rank according to the date on which their appointment was notified. The judge who is senior in point of age takes precedence when the date of notification is the same. The deputy judges are assimilated, in the exercise of their functions, with the judges. They rank, however, below the latter.

Article 5

The judges enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

Before taking their seat, the judges and deputy judges must, before the Administrative Council, swear or make a solemn affirmation to exercise their functions impartially and conscientiously.

Article 6

The Court annually nominates three judges to form a special delegation, and three more to replace them should the necessity arise. They may be reëlected. They are balloted for. The persons who secure the largest number of votes are considered elected. The delegation itself elects

its president, who, in default of a majority, is appointed by lot.

A member of the delegation cannot exercise his duties when the Power which appointed him, or of which he is a national, is one of the parties.

The members of the delegation are to conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

Article 7

A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge cannot act as agent or advocate before the Court of Arbitral Justice or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act for one of the parties in any capacity whatsoever so long as his appointment lasts.

Article 8

The Court elects its president and vice-president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are even, by lot.

Article 9

The judges of the Court of Arbitral Justice receive an annual salary of 6,000 Netherland florins. This salary is paid at the end of each half-year, reckoned from the date on which the Court meets for the first time.

In the exercise of their duties during the sessions or in the special cases covered by the present Convention, they receive the sum of 100 florins *per diem*. They are further entitled to receive a traveling allowance fixed in accord-

ance with regulations existing in their own country. The provisions of the present paragraph are applicable also to a deputy judge when acting for a judge.

These emoluments are included in the general expenses of the Court dealt with in Article 31, and are paid through the International Bureau created by the Convention for the pacific settlement of international disputes.

Article 10

The judges may not accept from their own Government or from that of any other Power any remuneration for services connected with their duties in their capacity of members of the Court.

Article 11

The seat of the Court of Arbitral Justice is at The Hague, and cannot be transferred, unless absolutely obliged by circumstances, elsewhere.

The delegation may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

Article 12

The Administrative Council fulfils with regard to the Court of Arbitral Justice the same functions as to the Permanent Court of Arbitration.

Article 13

The International Bureau acts as registry to the Court of Arbitral Justice, and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The secretary general of the Bureau discharges the functions of registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

ARTICLE 14

The Court meets in session once a year. The session opens the third Wednesday in June, and lasts until all the business on the agenda has been transacted.

The Court does not meet in session if the delegation considers that such meeting is unnecessary. However, when a Power is party in a case actually pending before the Court, the pleadings in which are closed, or about to be closed, it may insist that the session should be held.

When necessary, the delegation may summon the Court in extraordinary session.

ARTICLE 15

A report of the doings of the Court shall be drawn up every year by the delegation. This report shall be forwarded to the contracting Powers through the International Bureau. It shall also be communicated to the judges and deputy judges of the Court.

ARTICLE 16

The judges and deputy judges, members of the Court of Arbitral Justice, can also exercise the functions of judge and deputy judge in the International Prize Court.

PART II.—*Competency and Procedure*

ARTICLE 17

The Court of Arbitral Justice is competent to deal with all cases submitted to it, in virtue either of a general undertaking to have recourse to arbitration or of a special agreement.

ARTICLE 18

The delegation is competent:

1. To decide the arbitrations referred to in the preceding article, if the parties concerned are agreed that the

summary procedure, laid down in Part IV, Chapter IV, of the Convention for the pacific settlement of international disputes is to be applied.

2. To hold an inquiry under and in accordance with Part III of the said Convention, in so far as the delegation is entrusted with such inquiry by the parties acting in common agreement. With the assent of the parties concerned, and as an exception to Article 7, paragraph 1, the members of the delegation who have taken part in the inquiry may sit as judges, if the case in dispute is submitted to the arbitration of the Court or of the delegation itself.

Article 19

The delegation is also competent to settle the *compromis* referred to in Article 52 of the Convention for the pacific settlement of international disputes if the parties are agreed to leave it to the Court.

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach an understanding through the diplomatic channel, in the case of:

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, providing for a *compromis* in all disputes, and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the delegation. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one Power by another Power as due to its nationals, and for the settlement of which the offer of arbitration has

been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

Article 20

Each of the parties concerned may nominate a judge of the Court to take part, with power to vote, in the examination of the case submitted to the delegation.

If the delegation acts as a commission of inquiry, this task may be entrusted to persons other than the judges of the Court. The traveling expenses and remuneration to be given to the said persons are fixed and borne by the Powers appointing them.

Article 21

The contracting Powers only may have access to the Court of Arbitral Justice set up by the present Convention.

Article 22

The Court of Arbitral Justice follows the rules of procedure laid down in the Convention for the pacific settlement of international disputes, except in so far as the procedure is laid down in the present Convention.

Article 23

The Court determines what language it will itself use and what languages may be used before it.

Article 24

The International Bureau serves as channel for all communications to be made to the judges during the interchange of pleadings provided for in Article 63, paragraph 2, of the Convention for the pacific settlement of international disputes.

Article 25

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the Power on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose can only be rejected when the Power applied to considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

Article 26

The discussions are under the control of the president or vice president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by one of the parties cannot preside.

Article 27

The Court considers its decisions in private, and the proceedings are secret.

All decisions are arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4, paragraph 1, is not counted.

Article 28

The judgment of the Court must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar.

ARTICLE 29

Each party pays its own costs and an equal share of the costs of the trial.

ARTICLE 30

The provisions of Article 21 to 29 are applicable by analogy to the procedure before the delegation.

When the right of attaching a member to the delegation has been exercised by one of the parties only, the vote of the member attached is not recorded if the votes are evenly divided.

ARTICLE 31

The general expenses of the Court are borne by the contracting Powers.

The Administrative Council applies to the Powers to obtain the funds requisite for the working of the Court.

ARTICLE 32

The Court itself draws up its own rules of procedure, which must be communicated to the contracting Powers.

After the ratification of the present Convention the Court shall meet as early as possible in order to elaborate these rules, elect the president and vice president, and appoint the members of the delegation.

ARTICLE 33

The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated through the Netherland Government to the contracting Powers, which will consider together as to the measures to be taken.

PART III.—*Final Provisions*

ARTICLE 34

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the signatory Powers.

Article 35

The Convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

The denunciation shall only have effect in regard to the notifying Power. The Convention shall continue in force as far as the other Powers are concerned.

APPENDIX II: No. 6

ARTICLE XIV OF THE COVENANT OF THE LEAGUE OF NATIONS PROVIDING FOR THE CREATION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE[1]

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

[1] Printed from the official text of the "*Treaty of Peace between the Allied and Associated Powers and Germany*," June 28, 1919, p. 13.

APPENDIX II: No. 7

DRAFT-SCHEME FOR THE INSTITUTION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE MENTIONED IN ARTICLE 14 OF THE COVENANT OF THE LEAGUE OF NATIONS PRESENTED TO THE COUNCIL OF THE LEAGUE BY THE ADVISORY COMMITTEE OF JURISTS[1]

July 23, 1920.

Article 1

A Permanent Court of International Justice, to which Parties shall have direct access, is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organised by the Hague Conventions of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

CHAPTER I

Organisation of the Court

Article 2

The Permanent Court of International Justice shall be composed of a body of independent judges, elected, regardless of their nationality, from amongst persons of high moral character, who possess the qualifications required, in their respective countries, for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law.

[1] League of Nations, *Official Journal*, Special Supplement No. 2, September, 1920.

Article 3

The Court shall consist of 15 members: 11 judges and 4 deputy-judges. The number of judges and deputy-judges may be hereafter increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of 15 judges and 6 deputy-judges.

Article 4

The members of the Court shall be elected by the Assembly and the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

Article 5

At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the members of the Court of Arbitration, belonging to the States mentioned in the Annex to the Covenant or to the States which shall have joined the League subsequently, inviting them to undertake, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

No group may nominate more than two persons; the nominees may be of any nationality.

Article 6

Before making these nominations, each national group is hereby recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law.

Article 7

The Secretary-General of the League of Nations shall prepare a list in alphabetical order, of all the persons thus

nominated. These persons only shall be eligible for appointment, except as provided in Article 12, paragraph 2.

The Secretary-General shall submit this list to the Assembly and to the Council.

Article 8

The Assembly and the Council shall proceed to elect by independent votings first the judges and then the deputy-judges.

Article 9

At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilisation and the principal legal systems of the world.

Article 10

Those candidates who obtain an absolute majority of votes in the Assembly and the Council shall be considered as elected.

In the event of more than one candidate of the same nationality being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

Article 11

If, after the first sitting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third sitting shall take place.

Article 12

If after the third sitting one or more seats still remain unfilled, a joint Conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either

the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the Committee is unanimously agreed upon any person who fulfils the required conditions he may be included in its list, even though he was not included in the list of nominations made by the Court of Arbitration.

If the Joint Conference is not successful in procuring an election, those members of the Court who have already been appointed shall, within a time limit to be arranged by the Council, proceed to fill the vacant seats by selection from amongst those candidates who have obtained votes either in the Assembly or in the Council.

In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

Article 13

The members of the Court shall be elected for nine years.

They may be reëlected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall complete any cases which they may have begun.

Article 14

Vacancies which may occur shall be filled by the same method as that laid down for the first election. A member of the Court elected to replace a member, the period of whose appointment has not expired, will hold the appointment for the remainder of his predecessor's term.

Article 15

Deputy-judges shall be called upon to sit in the order laid down in a list.

This list shall be prepared by the Court, having regard

first to the order in time of each election and secondly to age.

ARTICLE 16

The exercise of any function which belongs to the political direction, national or international, of States, by the Members of the Court during their terms of office is declared incompatible with their judicial duties.

Any doubt upon this point is settled by the decision of the Court.

ARTICLE 17

No member of the Court can act as agent, counsel or advocate in any case of an international nature.

No member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel, or advocate for one of the contesting parties, or as a member of a national or international Court, or of a Commission of Inquiry, or in any other capacity.

Any doubt upon this point is settled by the decision of the Court.

ARTICLE 18

A member of the Court cannot be dismissed unless, in the unanimous opinion of the other Members, he has ceased to fulfil the required conditions.

When this happens a formal notification shall be given to the Secretary-General.

This notification makes the place vacant.

ARTICLE 19

The members of the Court, when outside their own country, shall enjoy the privileges and immunities of diplomatic representatives.

ARTICLE 20

Every member of the Court shall, before taking up his

duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

Article 21

The Court shall elect its President and Vice-President for three years; they may be reëlected.

It shall appoint its Registrar.

The duties of Registrar of the Court shall not be considered incompatible with those of Secretary-General of the Permanent Court of Arbitration.

Article 22

The seat of the Court shall be established at The Hague.

The President and Registrar shall reside at the seat of the Court.

Article 23

A session shall be held every year.

Unless otherwise provided by rules of Court, this session shall begin on the 15th June, and shall continue for so long as may be necessary to complete the cases on the list.

The President may summon an extraordinary meeting of the Court whenever necessary.

Article 24

If, for some special reason, a member of the Court considers that he cannot take part in the decision of a particular case, he shall so inform the President.

If, for some special reason, the President considers that one of the members of the Court should not sit on a particular case, he shall give notice to the member concerned.

In the event of the President and the member not agreeing as to the course to be adopted in any such case, the matter shall be settled by the decision of the Court.

ARTICLE 25

The full Court shall sit except when it is expressly provided otherwise.

If 11 judges cannot be present, deputy-judges shall be called upon to sit in order to make up this number.

If, however, 11 judges are not available, a quorum of 9 judges shall suffice to constitute the Court.

ARTICLE 26

With a view to the speedy despatch of business the Court shall form, annually, a chamber composed of three judges, who, at the request of the contesting parties, may hear and determine cases by summary procedure.

ARTICLE 27

The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

ARTICLE 28

Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates by a national group of the Court of Arbitration.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only.

Judges selected or chosen as laid down in paragraphs 2 and 3 of this article shall fulfil the conditions required by Articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues.

Article 29

The judges shall receive an annual salary to be determined by the Assembly of the League of Nations upon the proposal of the Council. This salary must not be decreased during the period of a judge's appointment.

The President shall receive a special grant for his period of office, to be fixed in the same way.

Deputy-judges shall receive a grant, for the actual performance of their duties, to be fixed in the same way.

Traveling expenses incurred in the performance of their duties shall be refunded to judges and deputy-judges who do not reside at the seat of the Court.

Grants due to judges selected or chosen as provided in Article 28 shall be determined in the same way.

The salary of the Registrar shall be decided by the Council upon the proposal of the Court.

A special regulation shall provide for the pensions to which the judges and Registrar shall be entitled.

Article 30

The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

CHAPTER II

Competence of the Court

Article 31

The Court shall have jurisdiction to hear and determine suits between States.

Article 32

The Court shall be open of right to the States mentioned in the Annex to the Covenant, and to such others as shall subsequently enter the League of Nations.

Other States may have access to it.

The conditions under which the Court shall be open of right or accessible to States which are not Members of the League of Nations shall be determined by the Council, in accordance with Article 17 of the Covenant.

Article 33

When a dispute has arisen between States, and it has been found impossible to settle it by diplomatic means, and no agreement has been made to choose another jurisdiction, the party complaining may bring the case before the Court. The Court shall, first of all, decide whether the preceding conditions have been complied with; if so, it shall hear and determine the dispute according to the terms and within the limits of the next Article.

Article 34

Between States which are Members of the League of Nations, the Court shall have jurisdiction (and this without any special convention giving it jurisdiction) to hear and determine cases of a legal nature, concerning:

(*a*) The interpretation of a treaty;

(*b*) Any question of international law;

(*c*) The existence of any fact which, if established, would constitute a breach of an international obligation;

(*d*) The nature or extent of reparation to be made for the breach of an international obligation;

(*e*) The interpretation of a sentence passed by the Court.

The Court shall also take cognisance of all disputes of any kind which may be submitted to it by a general or particular convention between the parties.

In the event of a dispute as to whether a certain case comes within any of the categories above mentioned, the matter shall be settled by the decision of the Court.

Article 35

The Court shall, within the limits of its jurisdiction as defined in Article 34, apply in the order following:

(1) International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;

(2) International custom, as evidence of a general practice, which is accepted as law;

(3) The general principles of law recognised by civilised nations;

(4) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 36

The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly.

When the Court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special Commission of from three to five members.

When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision.

CHAPTER III

Procedure

Article 37

The official language of the Court shall be French.

The Court may, at the request of the contesting parties, authorise another language to be used before it.

Article 38

A State desiring to have recourse to the Court shall lodge a written application addressed to the Registrar.

The application shall indicate the subject of the dispute, and name the contesting parties.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the Members of the League of Nations through the Secretary-General.

Article 39

If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it considers that circumstances so require, the provisional measures that should be taken to preserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

Article 40

The parties shall be represented by agents.

They may have Counsel or Advocates to plead before the Court.

Article 41

The procedure shall consist of two parts: written and oral.

Article 42

The written proceedings shall consist of the communication to the judges and to the parties of statements of cases, counter-cases and, if necessary, replies; also all papers and documents in support.

These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

A certified copy of every document produced by one party shall be communicated to the other party.

Article 43

The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the Government of the State upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Article 44

The proceedings shall be under the direction of the President, or in his absence, of the Vice-President; if both are absent, the senior judge shall preside.

Article 45

The hearing in Court shall be public, unless the Court, at the written request of one of the parties, accompanied by a statement of his reasons, shall otherwise decide.

Article 46

Minutes shall be made at each hearing, and signed by the Registrar and the President.

These minutes shall be the only authentic record.

Article 47

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Article 48

The Court may, even before the hearing begins, call upon the agents to produce any document, or to supply to the Court any explanations. Any refusal shall be recorded.

Article 49

The Court may, at any time, entrust any individual, bureau, commission or other body that it may select, with the task of carrying out an inquiry or giving an expert opinion.

Article 50

During the hearing in Court, the judges may put any questions, considered by them to be necessary, to the witnesses, agents, experts, advocates or counsel. The agents, advocates and counsel shall have the right to ask, through the President, any questions that the Court considers useful.

Article 51

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other agrees.

Article 52

Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favour of his claim.

The Court must, before doing so, satisfy itself, not only

that it has jurisdiction in accordance with Articles 33 and 34, but also that the claim is supported by substantial evidence and well founded in fact and law.

Article 53

When the agents, advocates and counsel, subject to the control of the Court, have presented all the evidence, and taken all other steps that they consider advisable, the President shall declare the case closed.

The Court shall withdraw to consider the judgment.

The deliberations of the Court shall take place in private and remain secret.

Article 54

All questions shall be decided by a majority of the judges present at the hearing.

In the event of an equality of votes, the President or his deputy shall have a casting vote.

Article 55

The judgment shall state the reasons on which it is based.

It shall contain the names of the judges who have taken part in the decision.

Article 56

If the judgment given does not represent, wholly or in part, the unanimous opinion of the judges, the dissenting judges shall be entitled to have the fact of their dissent or reservations mentioned. But the reasons for their dissent or reservations shall not be expressed in the judgment.

Article 57

The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.

Article 58

The judgment is final and without appeal. In the event of uncertainty as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Article 59

An application for revision of a judgment can be made only when it is based upon the discovery of some new fact, of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings in revision will be opened by a judgment of the Court expressly recording the existence of the new fact, recognising that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

No application for revision may be made after the lapse of five years from the date of the sentence.

Article 60

Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party.

It will be for the Court to decide upon this request.

Article 61

Whenever the construction of a convention, in which States other than those concerned in the case are parties, is in question, the Registrar shall notify all such States forthwith.

Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be as binding upon it as upon the original parties to the dispute.

Article 62

Unless otherwise decided by the Court, each party shall bear its own costs.

APPENDIX II: No. 8

STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE[1]

December 16, 1920.

Art. 1. A Permanent Court of International Justice is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organised by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

Chapter I

Organisation of the Court

Art. 2. The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their nationality from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law.

Art. 3. The Court shall consist of fifteen members: eleven judges and four deputy-judges. The number of judges and deputy-judges may hereafter be increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of fifteen judges and six deputy-judges.

Art. 4. The members of the Court shall be elected by the Assembly and by the Council from a list of persons

[1] League of Nations, *Treaty Series*, VI, p. 390.

nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

In the case of Members of the League of Nations not represented in the Permanent Court of Arbitration, the lists of candidates shall be drawn up by national groups appointed for this purpose by their Governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

Art. 5. At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the Members of the Court of Arbitration belonging to the States mentioned in the Annex to the Covenant or to the States which join the League subsequently, and to the persons appointed under paragraph 2 of Article 4, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case must the number of candidates nominated be more than double the number of seats to be filled.

Art. 6. Before making these nominations, each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of law.

Art. 7. The Secretary-General of the League of Nations shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible for appointment.

The Secretary-General shall submit this list to the Assembly and to the Council.

Art. 8. The Assembly and the Council shall proceed independently of one another to elect, firstly the judges, then the deputy-judges.

Art. 9. At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilisation and the principal legal systems of the world.

Art. 10. Those candidates who obtain an absolute majority of votes in the Assembly and in the Council shall be considered as elected.

In the event of more than one national of the same Member of the League being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

Art. 11. If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

Art. 12. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the Conference is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Articles 4 and 5.

If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been appointed shall, within a period to be fixed by the Council, proceed to fill the vacant seats by selection from amongst those candidates who have

obtained votes either in the Assembly or in the Council.

In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

Art. 13. The members of the Court shall be elected for nine years.

They may be reëlected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

Art. 14. Vacancies which may occur shall be filled by the same method as that laid down for the first election. A member of the Court elected to replace a member whose period of appointment had not expired will hold the appointment for the remainder of his predecessor's term.

Art. 15. Deputy-judges shall be called upon to sit in the order laid down in a list.

This list shall be prepared by the Court and shall have regard firstly to priority of election and secondly to age.

Art. 16. The ordinary members of the Court may not exercise any political or administrative function. This provision does not apply to the deputy-judges except when performing their duties on the Court.

Any doubt on this point is settled by the decision of the Court.

Art. 17. No member of the Court can act as agent, counsel or advocate in any case of an international nature. This provision only applies to the deputy-judges as regards cases in which they are called upon to exercise their functions on the Court.

No member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel or advocate for one of the contesting parties, or as a member of a national or international court, or of a commission of inquiry, or in any other capacity.

Any doubt on this point is settled by the decision of the Court.

Art. 18. A member of the Court cannot be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.

Formal notification thereof shall be made to the Secretary-General of the League of Nations, by the Registrar.

This notification makes the place vacant.

Art. 19. The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Art. 20. Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

Art. 21. The Court shall elect its President and Vice-President for three years; they may be reëlected.

It shall appoint its Registrar.

The duties of Registrar of the Court shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration.

Art. 22. The seat of the Court shall be established at The Hague.

The President and Registrar shall reside at the seat of the Court.

Art. 23. A session of the Court shall be held every year.

Unless otherwise provided by rules of Court, this session shall begin on the 15th of June, and shall continue for so long as may be deemed necessary to finish the cases on the list.

The President may summon an extraordinary session of the Court whenever necessary.

Art. 24. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

If the President considers that for some special reason

one of the members of the Court should not sit on a particular case, he shall give him notice accordingly.

If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

Art. 25. The full Court shall sit except when it is expressly provided otherwise.

If eleven judges cannot be present, the number shall be made up by calling on deputy-judges to sit.

If, however, eleven judges are not available, a quorum of nine judges shall suffice to constitute the Court.

Art.26. Labor cases, particularly cases referred to in Part XIII (Labor) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace, shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. On all occasions the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to insuring a just representation of the competing interests.

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favour of a judge chosen by the other party in accordance with Article 31.

The technical assessors shall be chosen for each particular case in accordance with the rules of procedure under

Article 30 from a list of "Assessors for Labor cases" composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labor Office. The Governing Body will nominate, as to one-half, representatives of the workers, and as to one-half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding Articles of the other Treaties of Peace.

In labor cases the International Labor Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.

Art. 27. Cases relating to transit and communications, particularly cases referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. When desired by the parties or decided by the Court, the judges will be assisted by four technical assessors sitting with them, but without the right to vote.

If there is a national of one only of parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favour of a judge chosen by the other party in accordance with Article 31.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Transit and Communications cases" composed of two persons nominated by each Member of the League of Nations.

Art. 28. The special chambers provided for in Articles 26 and 27 may, with the consent of the parties to the dispute, sit elsewhere than at The Hague.

Art. 29. With a view to the speedy despatch of business, the Court shall form annually a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure.

Art. 30. The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

Art. 31. Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

Judges selected or chosen as laid down in paragraphs 2 and 3 of this Article shall fulfil the conditions required by

Articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues.

Art. 32. The judges shall receive an annual indemnity to be determined by the Assembly of the League of Nations upon the proposal of the Council. This indemnity must not be decreased during the period of a judge's appointment.

The President shall receive a special grant for his period of office, to be fixed in the same way.

The Vice-President, judges and deputy-judges, shall receive a grant for the actual performance of their duties, to be fixed in the same way.

Traveling expenses incurred in the performance of their duties shall be refunded to judges and deputy-judges who do not reside at the seat of the Court.

Grants due to judges selected or chosen as provided in Article 31 shall be determined in the same way.

The salary of the Registrar shall be decided by the Council upon the proposal of the Court.

The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the Court.

Art. 33. The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

Chapter II

Competence of the Court

Art. 34. Only States or Members of the League of Nations can be parties in cases before the Court.

Art. 35. The Court shall be open to the Members of the League and also to States mentioned in the Annex to the Covenant.

The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute towards the expenses of the Court.

Art. 36. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.

The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognise as compulsory, *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

(*a*) The interpretation of a treaty;

(*b*) Any question of international law;

(*c*) The existence of any fact which, if established, would constitute a breach of an international obligation;

(*d*) The nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Art. 37. When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted

by the League of Nations, the Court will be such tribunal.

Art. 38. The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;

2. International custom, as evidence of a general practice accepted as law;

3. The general principles of law recognised by civilised nations;

4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex æquo et bono*, if the parties agree thereto.

Chapter III

Procedure

Art. 39. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree that the case shall be conducted in English, the judgment will be delivered in English.

In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court will be given in French and English. In this case the Court will at the same time determine which of the two texts shall be considered as authoritative.

The Court may, at the request of the parties, authorise a language other than French or English to be used.

Art. 40. Cases are brought before the Court, as the case may be, either by the notification of the special agreement,

or by a written application addressed to the Registrar. In either case the subject of the dispute and the contesting parties must be indicated.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the Members of the League of Nations through the Secretary-General.

Art. 41. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

Art. 42. The parties shall be represented by agents.

They may have the assistance of counsel or advocates before the Court.

Art. 43. The procedure shall consist of two parts: written and oral.

The written proceedings shall consist of the communication to the judges and to the parties of cases, counter-cases and, if necessary, replies; also all papers and documents in support.

These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

A certified copy of every document produced by one party shall be communicated to the other party.

The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

Art. 44. For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the Government of the State upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Art. 45. The hearing shall be under the control of the President or, in his absence, of the Vice-President; if both are absent, the senior judge shall preside.

Art. 46. The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

Art. 47. Minutes shall be made at each hearing, and signed by the Registrar and the President.

These minutes shall be the only authentic record.

Art. 48. The Court shall make orders for the conduct of the case, shall decide the form and time in which each part must conclude its arguments, and make all arrangements connected with the taking of evidence.

Art. 49. The Court may, even before the hearing begins, call upon the agents to produce any document, or to supply any explanations. Formal note shall be taken of any refusal.

Art. 50. The Court may, at any time, entrust any individual, body, bureau, commission or other organisation that it may select, with the task of carrying out an inquiry or giving an expert opinion.

Art. 51. During the hearing, any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

Art. 52. After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

Art. 53. Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favour of his claim.

The Court must, before doing so, satisfy itself, not only

that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Art. 54. When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President shall declare the hearing closed.

The Court shall withdraw to consider the judgment.

The deliberations of the Court shall take place in private and remain secret.

Art. 55. All questions shall be decided by a majority of the judges present at the hearing.

In the event of an equality of votes, the President or his deputy shall have a casting vote.

Art. 56. The judgment shall state the reasons on which it is based.

It shall contain the names of the judges who have taken part in the decision.

Art. 57. If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion.

Art. 58. The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.

Art. 59. The decision of the Court has no binding force except between the parties and in respect of that particular case.

Art. 60. The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Art. 61. An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court

and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings for revision will be opened by a judgment of the Court expressly recording the existence of the new fact, recognising that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

The application for revision must be made at latest within six months of the discovery of the new fact.

No application for revision may be made after the lapse of ten years from the date of the sentence.

Art. 62. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party.

It will be for the Court to decide upon this request.

Art. 63. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.

Every State so notified has the right to intervene in the proceedings; but, if it uses this right, the construction given by the judgment will be equally binding upon it.

Art. 64. Unless otherwise decided by the Court, each party shall bear its own costs.

APPENDIX II: No. 9

PROTOCOL ESTABLISHING THE PERMANENT COURT OF INTERNATIONAL JUSTICE[1]

The Members of the League of Nations, through the undersigned, duly authorised, declare their acceptance of the adjoined Statute of the Permanent Court of International Justice, which was approved by a unanimous vote of the Assembly of the League on the 13th December, 1920, at Geneva.

Consequently, they hereby declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions of the above-mentioned Statute.

The present Protocol, which has been drawn up in accordance with the decision taken by the Assembly of the League of Nations on the 13th December, 1920, is subject to ratification. Each Power shall send its ratification to the Secretary-General of the League of Nations; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations.

The said Protocol shall remain open for signature by the Members of the League of Nations and by the States mentioned in the Annex to the Covenant of the League.

The Statute of the Court shall come into force as provided in the above-mentioned decision.

Executed at Geneva, in a single copy, the French and English texts of which shall both be authentic.

December 16, 1920.

The following States are signatories of the Protocol: Albania, Australia, Austria, Belgium, Bolivia, Brazil,

[1] League of Nations, *Treaty Series*, VI, p. 380.

British Empire, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Esthonia, Finland, France, Greece, Haiti, Hungary, India, Italy, Japan, Latvia, Liberia, Lithuania, Luxemburg, Netherlands, New Zealand, Norway, Panama, Paraguay, Persia, Poland, Portugal, Roumania, Salvador, Serb-Croat-Slovene State, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay, Venezuela.

Up to the present time, thirty-six States have ratified:

Albania, Australia, Austria, Belgium, Brazil, British Empire, Bulgaria, Canada, China, Cuba, Czechoslovakia, Denmark, Esthonia, Finland, France, Greece, Haiti, Hungary, India, Italy, Japan, Latvia, Lithuania, Netherlands, New Zealand, Norway, Poland, Portugal, Roumania, Serb-Croat-Slovene State, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay, Venezuela.

Optional Clause

The undersigned, being duly authorised thereto, further declare, on behalf of their Government, that from this date, they accept as compulsory *ipso facto* and without special Convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions: . . .

The following States are signatories of the Optional Clause; some of them signing on condition of reciprocity:

Austria, Brazil, Bulgaria, China, Costa Rica, Denmark, Dominican Republic, Finland, France, Haiti, Latvia, Liberia, Lithuania, Luxemburg, Netherlands, Norway, Panama, Portugal, Salvador, Sweden, Switzerland, Uruguay.

Up to the present time it has been ratified by:

Austria, Brazil, Bulgaria, China, Denmark, Esthonia, Finland, Haiti, Lithuania, Netherlands, Norway, Portugal, Sweden, Switzerland, Uruguay.

APPENDIX III: No. 1

FIRST RESOLUTION OF THE ADVISORY COMMITTEE OF JURISTS ASSEMBLED AT THE HAGUE RECOMMENDING AN INTERNATIONAL CONFERENCE IN CONTINUATION OF THE FIRST AND SECOND HAGUE CONFERENCES[1]

The Advisory Committee of Jurists, assembled at The Hague to draft a plan for a Permanent Court of International Justice,

Convinced that the security of States and the well-being of peoples urgently require the extension of the empire of law and the development of all international agencies for the administration of justice,

Recommends:

I. That a new conference of the nations in continuation of the first two conferences at The Hague be held as soon as practicable for the following purposes:

1. To restate the established rules of international law, especially, and in the first instance, in the fields affected by the events of the recent war.

2. To formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war.

3. To endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore.

[1] Printed from Original English draft. See J. B. Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists, Report and Commentary* (1920).

4. To consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted.

II. That the Institute of International Law, the American Institute of International Law, the Union Juridique Internationale, the International Law Association, and the Iberian Institute of Comparative Law be invited to prepare with such conference or collaboration inter sese as they may deem useful, projects for the work of the Conference to be submitted beforehand to the several Governments and laid before the Conference for its consideration and such action as it may find suitable.

III. That the Conference be named Conference for the Advancement of International Law.

IV. That this Conference be followed by further successive conferences at stated intervals to continue the work left unfinished.

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